(22,721)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1912.

No. 314.

JOSEPH PATSONE, PLAINTIFF IN ERROR,

vs.

THE COMMONWEALTH OF PENNSYLVANIA.

IN ERROR TO THE SUPREME COURT OF THE STATE OF PENNSYLVANIA.

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1 In the Supreme Court of Pennsylvania, in and for the Western District.

COMMONWEALTH OF PENNSYLVANIA,
County of Allegheny, Sct:

Among the records and proceedings of the Supreme Court of Pennsylvania, in and for the Western District, the following may be found as matter of file and of record at No. 27 Oct. Term, 1911, to wit:

2 *Copy of Docket Entries.*

No. 27, October Sessions, 1909.

COMMONWEALTH
VS.
JOSEPH PATSONE

W. M. Lemon, Attorney for Commonwealth.
Franklin A. Ammon, Attorney for Applicant.

Appeal from Decision of U. G. McMurray, Justice of the Peace, Noblestown.

Filed October 23rd, 1909, Eo die, appeal allowed, bond to be given in the sum of $50.00.
October 28th, 1909, Heard.
December 4th, 1909, after hearing the evidence and arguments of several, the defendant is adjudged guilty. (Opinion filed.)
Amendment to Petition filed February 12th, 1910.
Certiorari filed February 12th, 1910.
From the record,
Attest:
[SEAL.] WILLIAM H. COLEMAN,
Clerk of Courts.

3 In the Court of Quarter Sessions of Allegheny County, Pa.

No. —, October Sessions, 1909.

COMMONWEALTH OF PENNSYLVANIA
VS.
JOSEPH PATSONE.

To the Honorable the Judges of said Court:

The petition of Joseph Patsone respectfully represents to your Honorable Court:—
That he is the defendant in the above entitled case, and resides at

Noblestown, County aforesaid. On the 19th day of October, A. D. 1909, your petitioner avers that an officer came into his dwelling house, and while therein took into his custody and possession a shot gun belonging to petitioner, and also placed your petitioner under arrest and took him to the office of U. G. McMurray, Justice of the Peace, Noblestown, and immediately thereafter the said Justice of the Peace swore one witness. The testimony of this witness was not understood by your petitioner in any respect, nor did he know upon what charge he was being prosecuted, and after the testimony of the said witness being heard by the said Justice of the Peace,
4 petitioner was fined Twenty-five ($25.) dollars and costs amounting to Twenty nine and 27/100 ($29.27) dollars, which your petitioner was compelled then and there to pay, or otherwise would have been taken to prison; which fine and costs were paid under protest.

Your petitioner avers that he had no opportunity whatever to secure counsel to represent him, nor did he have an opportunity of obtaining an interpreter to ascertain the charge against him, nor did he have an opportunity of presenting his own evidence in this case, and therefore alleges that he did not obtain a fair and impartial trial before said Justice of the Peace, and the conduct of the said Justice of the Peace indicated disregard of law.

Your petitioner further alleges that by reason of said prosecution and the conduct of the arresting officer, as well as the Justice of the Peace herein, your said petitioner has suffered a violation of his constitutional rights in that his personal property was confiscated and he has not been secure in his dwelling house and possessions. Your petitioner further avers that he is lately informed that the proceedings were begun under an Act of Assembly of the Commonwealth of Pennsylvania of May 8th, 1909, and that he is in no wise guilty of any violation of said Act of Assembly, and that said Act of Assembly moreover is defective and for many reasons unconstitutional,
5 and that therefore in this issue there is a grave legal question involved.

Your petitioner therefore prays your Honorable Court that an appeal from said summary conviction of petitioner as aforesaid, may be allowed and your petitioner expects to be able to establish his innocence of the charge.

And he will ever pray, etc.

his
JOSEPH x PATSONE.
mark.

Attest:
F. A. AMMON.
J. B. WICKNER.

ALLEGHENY COUNTY, ss:

Joseph Patsone, petitioner above named, being duly sworn according to law deposes and says that the facts set forth in the foregoing petition are true and correct to the best of his knowledge, information and belief.

his
JOSEPH x PATSONE,
mark.

Sworn and subscribed to before me this 23 day of October, 1909.

WM. H. COLEMAN,
Clerk of Courts.

8 *Order of Court.*

And now, to wit, October 23, 1909, the foregoing petition presented in open court, and upon due consideration thereof it is ordered, adjudged and decreed that due cause for an appeal having been shown, the prayer of the petitioner is granted and an appeal is allowed. Bond in the sum of $50.00.

BY THE COURT.

7 No. —, — Term, 190–. Commonwealth of Pennsylvania versus Joseph Patsone. Charge, Violation Act of May 8", 1909. Information made October 19", 1909. On Oath of H. A. Woods. Coram: U. G. McMurray, Oakdale, Pa., Justice of the Peace. Costs, $—, Pros. Priv. Counsel —, Deft. Counsel —, Pros. found —, Defendant found —, Officer, —.

8 COMMONWEALTH OF PENNSYLVANIA
versus
JOSEPH PATSONE.

COMMONWEALTH OF PENNSYLVANIA,
County of Allegheny, ss:

Before me, the subscriber, U. G. McMurray a Justice of the Peace, in and for said county, personally came H. A. Woods who, upon oath administered according to law, deposeth and says that at Noblestown in the County of Allegheny on the 19" day of October A. D. 1909: That the above named defendant being an unnaturalized foreign-born resident of this Commonwealth owns or has in his possession a shot gun or rifle contrary to the Act of Assembly approved the 8" day of May 1909. Complainant therefore prays and desires that a warrant may issue and the aforesaid defendant Joseph Patsone may be arrested and held to answer this charge of Violation Act of May 8" 1909 and further deponent saith not.

(Signed) H. A. WOODS,
S. D. Game War.

—— —— tent in $— sub. con. to appear at and through — Sessions of Court of Quarter Sessions of said County to testify etc. Taken before me this — day of ——, 190–. — Term A. D. 190–.

—— ——. [SEAL.]

My Commission Expires first Monday of May, 1913.

Sworn to and subscribed before me this 19″ day of October, A. D. 1909.

[SEAL]

U. G. McMURRAY,
Justice of the Peace.

9 We, and each of us — do acknowledge ourselves, jointly and severally, indebted to the Commonwealth of Pennsylvania, in the sum of — Dollars, lawful money of the United States of America, to be levied of our and each of our lands and tenements, goods and chattels, — conditioned that the said —— —— shall be and appear at the — Term of Oyer and Terminer and Quarter Sessions for the County of — on the — Monday of ——, 190–, at the — then and there to answer the above charge — as may be preferred against the said —— —— and shall abide and not depart the Court without leave, and shall, in the meantime, keep the peace and be of good behavior toward all citizens of the Commonwealth, and more especially toward —— ——.

—— ——. [SEAL.]
—— ——. [SEAL.]
—— ——. [SEAL.]

Taken and acknowledged before me this — day of —— A. D. 190–.

—— ——,
Justice of the Peace.

10 COMMONWEALTH
versus
JOSEPH PATSONE.

Charge: Violation Act of May 8″, 1909.

Warrant Issued to H. A. Wools, S. D. G. W., October 19″, 1909, on Oath of H. A. Woods.

And now —— — 190–, — -tent, in $— sub. com. that the complainant —— —— will appear at the Court of Quarter Sessions, to testify, etc.

And now, October 8″ 1909, Defendant arrested and brought to office and the prosecutor being present, whereupon I the said Justice of the Peace, proceeded to examine into the truth of the said complaint in the presence of both defendant and prosecutor, and the prosecutor after being sworn testified that the defendant an unnaturalized resident did own or have in his possession a shot gun, at Noblestown Allegheny County, Pa., and the defendant produces no

evidence in his own behalf, Wherefore it appears to me the said Justice, that the said Joseph Patsone accordingly is guilty of the premises charged upon him by the said information. It is therefore adjudged by me the said Justice, that the defendant Joseph Patsone be convicted and he is accordingly convicted and adjudged guilty of the offence charged upon him, and I do hereby adjudge that
11 the said Jos. Patsone for the said offence has forfeited the sum of $25.00 and costs and in default of payment thereof be committed to the County Jail one day for each dollar of penalty imposed. Fine and costs paid this day.

COUNTY OF ALLEGHENY, *ss:*

I, a Justice of the Peace in and for said County, certify that the above is a true transcript from my docket, and that the recognizances were duly taken and acknowledged before me as aforesaid.

In Witness Whereof, I have hereunto set my hand and seal at Oakdale, Pa., this 21" day of October A. D. 1909.

U. G. McMURRAY, [SEAL.]
[SEAL.] *Justice of the Peace.*

My Commission expires First Monday May, 1913.

12	Fine	$25.00
	Information	.50
	Entry	.50
	Warrant	.50
	Def't Recog. for Hearing	...
	Commitment	...
	Release to Jailor	...
	Subpœna	...
	Writing Ex. of Def't	...
	Hearing	.75
	Continuance	...
	Oath	.10
	Pros. Recog	...
	Ent. Judg. on Con. Fine	.50
	Record conviction	.25
	Rec. Sentence	.25
	Trans. and Cert.	...
	Rep. to Game Comm.	.50
	Witness	

Constable.

Executing Warrant	100.
Mileage	12.
Serving Subpœna	...
Mileage	...
Executing Commitment	...

13 No. 27, October Sessions, 1909. Commonwealth of Pennsylvania vs. Joseph Patsone. Petition for an appeal from summary conviction and order of court. Filed Oct. 23, '09. Franklin A. Ammon, 301-3 Curry Building, 4th Ave. & Ross St., Pittsburgh, Pa.

14 No. 27, Oct. Sessions, 1909. Commonwealth of Pennsylvania vs. Joseph Patsone. Opinion. Evans, J. Filed Oct. 4, '09.

15 In the Court of Quarter Sessions of the Peace of Allegheny Co.

No. 27, October Sessions, 1909.

COMMONWEALTH OF PENNSYLVANIA
VS.
JOSEPH PATSONE.

Opinion.

EVANS, *J.*:

This is an appeal from a summary conviction, and the facts which are undisputed are as follows:

The defendant, Joseph Patsone, was on October 19th, 1909, found guilty of having in his possession a double barrelled shot gun and a fine of $25 was imposed. From this judgment the defendant appealed. The authority of the magistrate to impose the fine was by virtue of the Act of Assembly approved May 8th, 1909, P. L. 463. Section 1, of that Act provides that "From and after the passage of this Act it shall be unlawful for any unnaturalized foreign-born resident to hunt for, capture or kill in this Commonwealth any wild bird or animal, either game or otherwise, of any description, excepting in defense of person or property; and to that end it shall
16 be unlawful for any unnaturalized foreign-born resident within this commonwealth to either own or be possessed of a shot gun or rifle of any make. Each and every person violating any provision of this section shall upon conviction thereof be sentenced to pay a penalty of $25 for each offense or undergo imprisonment in the common jail of the county for the period of one day for each dollar of penalty imposed."

Section 3rd provides: "That the possession of a shot gun or rifle at any place outside of building shall be conclusive proof of a violation of the provisions of Section 1 of this Act." Section 4 provides: "That the presence of a shot gun or rifle in a room or house, building or tent or camp of any description within this Commonwealth occupied or controlled by an unnaturalized foreign-born resident shall be prima facie evidence that such gun is owned or controlled by the person occupying or controlling the property in which said gun is found, and shall render such person liable to the penalty imposed by Section 1 of this act."

It is clear that the legislature in prohibiting a foreign born un-

naturalized person from hunting game in this Commonwealth intended by this act to take away from such persons the means by which game could be hunted, and intended to make the possession of a shot gun or a rifle an offense separate and distinct from the offense of hunting game.

17 The defendant admits the possession and ownership of the gun, but raises the legal question that both the prohibition to hunt game and the prohibition to have in his possession a shot gun or a rifle are unconstitutional. The act clearly does not violate the terms of the Bill of Rights, because the prohibition of the possession of a shot gun or a rifle is not a prohibition to bear arms. Arms of defense such as revolvers and knives are left to the foreigners for their use.

But it has been urged that this act is contrary to the provisions of the fourteenth amendment to the Constitution of the United States in that it "denies to the persons herein described the equal protection of the laws." That clause of the amendment to the Constitution has been construed to mean the protection of equal laws; but if it be contended that the clause has fixed an absolute equality between the alien and the citizen, then all the laws of the various states regulating inheritance of property by aliens, taxing gifts and legacies to them, closing to them certain fields of employment such as the sale of spirituous, vinous and malt liquors are all unconstitutional. We do not think that that was the intendment of that clause of the amendment. The right to hunt game in Pennsylvania is a privilege given by the state and not an inherent right in the inhabitants of the state. Wild animals and game of all sorts have from time immemorial been the property of the sovereign, and in Pennsylvania, the property of the state. Its power to regulate and to prohibit the hunting and killing of game has always been conceded. The State of

18 Pennsylvania prohibits the sale of liquor by any person except a citizen of the State. The question of the right of the state to so prohibit an alien from the privilege of selling liquor was decided in a very able opinion in Trageser v. Gray, 73 Maryland, page 250, and the right of the state sustained. This act in no way discriminates against the person or the property of the alien in prohibiting his hunting of game, and does not offend against the fourteenth amendment of the Constitution.

But this defendant was not adjudged guilty of hunting game, nor was there any evidence that the gun which was found in his possession had been or was intended to be used by him in hunting game; but as we read the Act of Assembly, there are two separate and distinct offenses created by this act; the first is the hunting of game by the alien, and the second is his having in his possession a shot gun or a rifle. The evident purpose of the legislature in making it unlawful for an alien to have in his possession a shot gun or a rifle was to aid in the carrying out of the other prohibition of the act, namely, the hunting of game. It is similar to that provision of the laws in many states which makes it unlawful to have in one's possession fish nets, although there be no evidence that the nets were actually used in catching fish. It is similar in its provision to the act of the legis-

lature of Iowa which prohibited the manufacture and sale of
19 spirituous, vinous or malt liquors in that state except for mechanical, medicinal, culinary or sacramental purposes, and gave to every citizen in the state the right to manufacture and sell for those specified purposes excepting hotel keepers, saloon keepers, proprietors of eating houses and confectioners. Here is the prohibition to a certain class to do a lawful act simply because of the ease with which it would be possible for that class to evade the law, and the difficulty of their detection if they were permitted to do the lawful acts under the law.

There is no well defined line marking the boundaries of the police power of the state. Somewhere a discretion must be lodged. The legislature represents the body of the commonwealth. To them is given the discretion to say by their enactments what is for the general good. It is true that the courts have always exercised a supervision over this discretion; but the act of the legislature in this regard ought not to be annulled except where it clearly abuses the discretion. In the case of Geer v. Connecticut, 161 United States, 519, the Statute of the state provided: "No person shall at any time kill any woodcock, ruffled grouse or quail for the purpose of conveying the same beyond the limits of this state; or shall transport, or have in
20 possession with intent to procure the transportation beyond said limits, any such birds killed within this state. The reception by any person within this state of any such bird or birds for shipment to a point without the state shall be prima facie evidence that said bird or birds were killed within the state for the purpose of carrying the same beyond its limits." The defendant was arrested and convicted charged with unlawfully receiving and having in his possession, with wrongful and unlawful intent to procure the transportation without the limits of the state, certain woodcock, ruffled grouse and quail killed within this state after the first day of October 1889. On Appeal to the Criminal Court the defendant demurred and assigned the following errors:

"1st. The court erred in holding that the allegations contained in the complaint constitutes an offense in law.

2nd. In holding that said complaint was sufficient in law without an allegation that the birds therein mentioned were killed in this state for the purpose of conveying the same beyond the limits of this state."

On an affirmance of the conviction by the Supreme Court of Connecticut, the case was appealed to the Supreme Court of the United States and the judgment of the Supreme Court of the state was affirmed. It will be observed that this conviction was sus-
21 tained on the proof of the mere possession of the birds with intent to transport them beyond the state, the fact of possession being by the Act of the legislature, prima facie evidence that the birds were killed within the state.

In the case of Lawton v. Steele, the plaintiff brought suit against a game warden for trespass for damages for the destruction of fish nets. Some of the nets destroyed were in actual use when found and some of them were not. Judgment being entered for the

defendant in the Court of Appeals of New York, the case was taken to the Supreme Court of the United States and reported in 152 United States, 133. The act of Assembly of New York upon which the defendant based his right to destroy fish nets of the plaintiff is as follows:

"Any net, pound or other means or device for taking or capturing fish or whereby they may be taken or captured, set, put, floated, had found or maintained in or upon any of the waters of this state or upon the shores of or islands in any of the waters of this state, in violation of any existing or hereafter enacted statutes or laws for the protection of fish is hereby declared to be and is a public nuisance, and may be abated and summarily destroyed by any person, etc."

It will be observed that it was not necessary in order to make the possession of nets a public nuisance, that they should be
22 actually used in the taking of fish contrary to law, but if they were found on any of the shores of or any of the islands of the waters of New York, they were declared to be a public nuisance. In affirming the decision of the Court of New York, the Supreme Court of the United States say:

"It is said, however, that the nets are not in themselves a nuisance but are perfectly lawful acts of manufacture and are ordinarily used for a lawful purpose. This is, however, by no means a conclusive answer. Many articles, such, for instance, as cards, dice and other articles used for gambling purposes are perfectly harmless in themselves but may become nuisances by being put to an illegal use, and in such cases fall within the ban of the law, and may be summarily destroyed. It is true that this rule does not always follow from the illegal use of a harmless article. A house may not be torn down because it is put to an illegal use, since it may be as readily used for a lawful purpose. But where minor articles of personal property are devoted to such use, the fact that they may be used for a lawful purpose would not deprive the legislature of the power to destroy them. The power of the legislature to declare that which is perfectly innocent in itself to be unlawful is beyond question,
23 and in such case the legislature may annex to the prohibited act all the incidents of a criminal offense including the destruction of property denounced by it as a public nuisance."

We are of opinion that the act under which the defendant was adjudged guilty was clearly within the powers of the legislature of the State.

The defendant excepts to the order of the court adjudging the defendant guilty of the offense charged in the information.

Exception is allowed and bill sealed for the defendant.

J. A. EVANS, *J.* [SEAL.]

24 In the Court of Quarter Sessions of Allegheny County.

No. 27, Oct. Sessions, 1909.

COMMONWEALTH OF PENNSYLVANIA
vs.
JOSEPH PATSONE.

Amendment to Petition.

It is hereby agreed by counsel, that the petition for the allowance of the appeal from a summary conviction in the above entitled case, shall be amended by adding thereto the following averment; and the same be incorporated in record as a fact agreed by counsel and found by the court:

"That Joseph Patsone, the defendant, is a citizen of the Kingdom of Italy and a subject of the King of Italy."

W. H. LEMON,
Attorney for Commonwealth.
FRANKLIN A. AMMON,
HARRY F. STAMBAUGH,
Attorneys for Defendant.

25 *Order.*

And now, to-wit, the 12th day of February, 1910, the foregoing amendment is allowed and is hereby made.

By the Court.

J. A. EVANS, *J.*

26 No. 27, October Sessions, 1909. Commonwealth of Pennsylvania vs. Joseph Patsone. Amendment to Petition. Filed Feb'y 12, 1910.

27 *Superior Court Docket Entries.*

No. 162, April Term, 1910.

COMMONWEALTH OF PENNSYLVANIA
vs.
JOSEPH PATSONE, Appellant.

Appeal from Quarter Sessions Allegheny County, at No. 27 of October Sessions, 1909.

Appeal and affidavit filed and Writ exit February 10, 1910.

February 15, 1910. Petition to transfer to Williamsport filed, to be heard with Commonwealth v. Cosick, No. 140, April Term, 1910, at Williamsport, Tuesday March 1, 1910.

Eo die.		Petition sent to Prothonotary Bentley.
March	1, 1910.	Advanced as prayed; to be heard with No. 140, April Term, 1910.
Eo die.		Argued with 140.
March	7, 1910.	Record, assignments and petition to advance received from Williamsport.
October	10, 1910.	Judgment affirmed. Orlady, J.
October	18, 1910.	Petition for allowance of appeal to the Supreme Court filed.
Eo die.		Order to retain record pending disposition of petition filed.
October	22, 1910	Petition granted. Per Curiam.
October	26, 1910.	Certiorari from Supreme Court at No. 20, October Term, 1911, filed.
Eo die.		Record filed in Supreme Court.

28 In the Superior Court of Pennsylvania, Sitting at Pittsburgh.

Court of Quarter Sessions, County of Allegheny, October Sessions, 1909.

No. 27, of —— Term, 19—.

COMMONWEALTH OF PENNSYLVANIA
vs.
JOSEPH PATSONE, Appellant.

Enter Appeal on behalf of Joseph Patsone, defendant from the judgment of the Court of Quarter Sessions of the County of Allegheny.

HARRY F. STAMBAUGH,
Attorneys for Appellant.

To George Pearson, Prothonotary of The Superior Court of Pennsylvania Sitting at Pittsburg.

COUNTY OF ALLEGHENY, ss:

Harry F. Stambaugh being duly sworn, saith that the above Appeal is not intended for delay, but because Appellant believes he has suffered injustice by the judgment from which he appeals.

HARRY F. STAMBAUGH.

Sworn and subscribed before me this 10th day of February A. D. 1910.

GEORGE PEARSON,
Prothonotary.

28½ [Endorsed:] No. 162, April Term, 1910. Superior Court of Pennsylvania, Sitting at Pittsburgh. Commonwealth of

Pennsylvania vs. Joseph Patsone, Appellant. Appeal and Affidavit Filed Feb. 10, 1910, Superior Court, Fifth District. Harry F. Stambaugh, Attorneys for Appellant.

29 THE SUPERIOR COURT OF PENNSYLVANIA,
County of Allegheny, ss:

The Commonwealth of Pennsylvania to the judges of the Court of Quarter Sessions for the County of Allegheny, Greeting:

We being willing for certain causes, to be certified of the matter of the Appeal of Joseph Patsone from the judgment of your said Court, at No. 27 of October Sessions, A. D. 1909 Wherein, the Commonwealth of Pennsylvania is plaintiff and the above named appellant is defendant before you, or some of you, depending, Do Command You, that the record and proceedings aforesaid, with all things touching the same, before the Judges of our Superior Court of Pennsylvania, at a Superior Court to be holden at Pittsburgh, the first Monday of March next, to wit, March 7th A. D. 1910 so full and entire as in your Court before you they remain, you certify and send, together with this Writ, that we may further cause to be done thereupon that which of right and according to the laws of the said State ought.

Witness the Honorable Charles E. Rice, Doctor of Laws, President Judge of our said Superior Court at Pittsburgh, the tenth day of February in the year of our Lord one thousand nine hundred and ten.

[Seal of the Superior Court of Pennsylvania.]

GEORGE PEARSON,
Prothonotary.

[Endorsed:] #27, October Sess., 1909. No. 162, of April Term, 1910. Superior Court. Commonwealth vs. Joseph Patsone, Appellant. Certiorari to the Court of Quarter Sessions for the County of Allegheny Returnable the first Monday of March A. D. 1910. Rule on the Appellee, to appear and plead on the Return-day of the Writ. George Pearson, Prothonotary. Note:—No application for the allowance of special supersedeas will be considered unless Rule 37 of the Superior Court is strictly complied with. Filed Mar. 7, 1910. Superior Court. Rec'd from Williamsport. Marcel A. Viti, Harry F. Stambaugh, Attorneys for Appellant. Filed Feb'y 12th, 1910.

To the Honorable the Judges of the Superior Court of the Commonwealth of Pennsylvania, sitting at Pittsburgh:

The record and process, and all things touching the same, so full and entire as before us they remain, we certify and send, as within we are commanded.

J. A. EVANS, [L. S.]
Trial Judge.

30 No. 162, April Term, 1910. In the Superior Court of Pennsylvania 5th Judicial Dist. Commonwealth of Penn-

sylvania vs. Joseph Patsone, Appellant. Petition to advance case for argument. March 1, '10 advanced as prayed; to be heard with No. 8. By the Court. Marcel A. Viti, Harry F. Stambaugh, Att'ys for Appellant. Filed Feb. 15, 1910. Superior Court, Fifth District.

31 In the Superior Court of Pennsylvania, Fifth Judicial District, April Term, 1910.

No. 162.

COMMONWEALTH OF PENNSYLVANIA
vs.
JOSEPH PATSONE, Appellant.

Appeal by Defendant from Judgment of Court of Quarter Sessions of Allegheny County, at No. 27, October Sessions, 1909.

Petition to Advance Case for Argument.

To the Honorable the Judges of said Court:

The petition of Joseph Patsone, the defendant and appellant, respectfully represents:

Your petitioner was convicted and sentenced to pay a fine, by a Justice of the Peace, upon the charge that—

"the defendant being an unnaturalized foreign-born resident of this commonwealth, owns or has in his possession, a shot gun or rifle, contrary to the Act of Assembly approved the 8th day of May, 1909."

He petitioned the Court of Quarter Sessions of Allegheny
32 County for the allowance of an appeal from such conviction, assigning as one of the reasons therefor, that said act of May 9, 1909, P. L. 466 was unconstitutional.

The said court allowed an appeal, but on December 4, 1909, affirmed said conviction, and in its opinion, by his Honor, Judge Evans, held that the act of May 8, 1909 was not in violation of the Bill of Rights of the constitution of Pennsylvania, or the Fourteenth Amendment of the Constitution of the United States. Your Petitioner perfected his appeal to this court on February 11, 1910.

The case of Commonwealth v. Cosick, No. 140 April Term, 1910, an appeal from the judgment of the court of Quarter Sessions of Indiana County, is set for argument before this court on March 1, 1910, at Williamsport, Pa. In that case, the defendant was summarily convicted of the charge of violating the aforesaid act of May 8, 1909, and on appeal to the Court of Quarter Sessions, the conviction was set aside on the ground that said act of May 8, 1909, was unconstitutional as in violation of the Fourteenth Amendment of the Constitution of the United States. From this judgment, an appeal to this court was taken by the Commonwealth.

Your petitioner's appeal and the appeal in the case of Common-

wealth v. Cosick, raise the same question of the constitution-
33 ality of said Act of May 8, 1909, and the decisions of the lower courts in these two cases, (both reported in 57 Pittsburgh Legal Journal, pages 337 and 342), are directly contrary.

Further, petitioner is a citizen of the Kingdom of Italy, and his appeal involves the question whether this conviction, under said act of May 8, 1909, is in violation of the treaty between the United States and the Kingdom of Italy; and in the case of Commonwealth v. Cosick, the defendant is a citizen of Austria, Hungary, and that case involves a similar question, whether that conviction is in violation of the treaty betwen the United States and Austria Hungary.

W. H. Lemon, Esquire, counsel for the Commonwealth, the appellee, in your petitioner's case, and also for the Commonwealth, appellant, in the case of Commonwealth v. Cosick, has consented in writing, which is hereto attached, that your petitioner's case be heard on March 1, 1910, with the case of Commonwealth v. Cosick. William N. Liggett and E. Walter Smith, attorneys for the appellee in Commonwealth v. Cosick have likewise consented.

Wherefore your petitioner prays that his case be advanced for argument, and heard at the term of court to be held at Williamsport, on the 1st day of March, 1910, at the same time with the above mentioned case of Commonwealth v. Cosick.

HARRY F. STAMBAUGH,
Attorney for Appellant.

34 STATE OF PENNSYLVANIA,
County of Allegheny, ss:

Before me personally appeared, Harry F. Stambaugh, who being duly sworn according to law, deposes and says that he is familiar with the facts set forth in the foregoing petition, and that the same are true and correct as he verily believes.

HARRY F. STAMBAUGH.

Sworn and subscribed before me this 15th day of February 1910.

GEO. PEARSON,
Prothonotary.

I hereby consent that the case of Commonwealth v. Patsone No. 162 April Term 1910, be advanced and heard at Williamsport, on March 1st, 1910, with the case of Commonwealth v. Cosick, No. 140 April Term 1910.

W. H. LEMON,
Attorney for Commonwealth
in Commonwealth v. Cosick,
and Commonwealth v. Patsone.

William N. Liggett, Attorney at Law, Marshall Bldg.

INDIANA, PA., *February* 14, 1910.

Mr. H. F. Stambaugh, Pittsburgh, Pa.

DEAR SIR: In answer to your letter of the 11th regarding advancement of the Patsone appeal to Williamsport for hearing March 1, I will say I have consulted my colleague in the Cosick Appeal and we shall be pleased to have your case advanced and hope you will not only succeed in this but in the final result as well.

Yours truly,

WILLIAM N. LIGGETT,
E. WALKER SMITH,
Att'ys for Def't in Cosick Appeal.

In the Superior Court of Pennsylvania, April Term, 1910. No. 162. Commonwealth of Pennsylvania vs. Joseph Patsone, Appellant. Assignments of Error. Filed Feb. 22, 1910, in the Superior Court. March 7, 1910, Rec'd from Williamsport. Marcel A. Viti, Att'y for Appellant.

In the Superior Court of Pennsylvania, April Term, 1910.

No. 162.

COMMONWEALTH OF PENNSYLVANIA
vs.
JOSEPH PATSONE, Appellant.

Assignments of Error.

And now, February 21st, 1910, comes Joseph Patsone, by Marcel A. Viti, his attorney, and in connection with his appeal from the judgment of the lower court in the above case made and entered on December 4th, 1909, makes and files the following assignments of error.

(1) The learned court erred in not holding the Act of May 8th, 1909, unconstitutional and void because in conflict with Article III, Section 3 of the Constitution of Pennsylvania.

(2) The learned court erred in not holding the Act of May 8th, 1909, unconstitutional and void because in conflict with Article III, Section 7, subdivision 19 of the Constitution of Pennsylvania.

(3) The learned court erred in not holding the Act of May 8th, 1909, is unconstitutional and void because it violates the Fourteenth Amendment to the Constitution of the United States.

(4) The learned court erred in not holding that the Act of May 8th, 1909, is unconstitutional and void because it violates the provision of the Fourteenth Amendment to the Constitution of the United States, which forbids a State to deprive any person of life, liberty or property without due process of law.

(5) The learned court erred in not holding that the Act of May 8th, 1909, is unconstitutional and void because it violates the provision of the Fourteenth Amendment to the Constitution of the United States, which forbids a State to deprive any person of the equal protection of the laws.

(6) The learned court erred in not holding that the Act of May 8th, 1909, is unconstitutional and void because it is in contravention of the existing treaty of Commerce and Navigation between the United States and the Kingdom of Italy.

(7) The learned court erred in not holding that the Act of May 8th, 1909, is unconstitutional and void because it is in contravention of Article II of the existing treaty of Commerce and Navigation between the United States and the Kingdom of Italy.

(8) The learned court erred in not holding that the Act of May 8th, 1909, is unconstitutional and void because it is in contravention of Article III of the existing treaty of Commerce and Navigation between the United States and the Kingdom of Italy.

39 (9) The learned court erred in holding "that the Act under which the defendant was found guilty was clearly within the powers of the Legislature of the State.

(10) The learned court erred in entering the following judgment viz:, "After hearing the evidence and arguments of *several*, the defendant is adjudged guilty."

MARCEL A. VITI,
Attorney for Appellant.

40 In the Superior Court of Pennsylvania, April Term, 1910.

No. 162.

COMMONWEALTH OF PENNSYLVANIA
VS.
JOSEPH PATSONE.

Appeal by the Defendant from the Judgment of the Court of Quarter Sessions of Allegheny County.

Filed October 10, 1910.

OKLADY, *J.*:

The defendant, an unnaturalized foreign-born resident of this commonwealth, was adjudged guilty of violating the provisions of the act of May 8, 1909, P. L. 466,—in owning and having in his possession a double barreled shotgun. The facts are not in dispute, and it is conceded that the proceedings in the summary conviction before the justice of the Peace, and on appeal in the court of quarter sessions were regular. The principal contention is, that the provisions of this act are in violation of the stipulations of the fourteenth amendment of the federal constitution, viz: "Nor shall any state deprive any person of life, liberty or property without due

process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

The act in question is entitled: "An act to give additional protection to wild birds and animals and game, within the
41 commonwealth of Pennsylvania; prohibiting the hunting for, or capture or killing of such wild birds or animals or game by unnaturalized foreign-born residents; forbidding the ownership or possession of shotgun or rifle by any unnaturalized foreign born resident, within the commonwealth, and prescribing penalties for violation of its provisions." The first section provides: "It shall be unlawful for any unnaturalized foreign-born resident to hunt for or capture or kill, in this commonwealth, any wild bird or animal, either game or otherwise of any description, excepting in defence of person or property; and to that end, it shall be unlawful for any unnaturalized foreign-born resident within this commonwealth to either own or be possessed of a shotgun or rifle of any make. Each and every person violating any provision of this section shall, upon conviction thereof, be sentenced to pay a penalty of twenty-five dollars for each offense, or undergo imprisonment in the common jail of the county for the period of one day for each dollar of penalty imposed; Provided, that in addition to the above named penalty, all guns of the before-mentioned kinds found in the possession or under control of an unnaturalized foreign-born resident shall, upon conviction of such person, or upon his signing a declaration of guilt as prescribed by this act, be declared forfeited to the commonwealth of Pennsylvania, and shall be sold by the board of game commissioners as hereinafter directed." The third section
42 provides: "That the possession of a shotgun or rifle at any place outside of buildings within this commonwealth, by an unnaturalized foreign-born resident, shall be conclusive proof of a violation of the provisions of section one of this act, and shall render any person convicted thereof liable to the penalty as fixed by said section." And the fourth section: "That the presence of a shotgun or rifle in a room or house, or building or tent, or camp of any description, within this commonwealth, occupied or controlled by an unnaturalized foreign-born resident, shall be prima facie evidence that such gun is owned or controlled by the person occupying or controlling the property in which such gun is found, and shall render such person liable to the penalty imposed by section one of this act."

As stated by the learned trial judge: "The right to hunt game is but a privilege given by the legislature, and is not an inherent right in the residents of the state. Wild animals and game of all sorts have from time immemorial been the property of the sovereign, and in Pennsylvania the property of the state. Its power to regulate and prohibit the hunting and killing of game has always been conceded." This subject has been a fruitful source of legislation, and the frequent changes in our game and fish laws represent a zealous intention to define and supervise wild birds, animals, game and fish; to regulate how they are to be preserved and taken, declare the open and closed season when they may be taken; the manner and

amount of the killing, and the device, implement and method
43 permitted: Com. v. Immel, 33 Pa. Superior Ct. 389; Com. v. McComb, 39 Pa. Superior Ct. 411.

In Lawton v. Steele, 152 U. S. 135, the Supreme Court of the United States declare: "The preservation of game and fish, has always been treated as within the proper domain of the police power, and laws limiting the season within which birds and wild animals may be killed and exposed for sale, and prescribing the time and manner in which fish may be caught, have repeatedly been upheld by the courts * * * it is within the authority of the legislature to impose restrictions and limitations upon the time and manner of taking fish and game, considered valuable as articles of food or merchandise. The power to enact such laws has long been exercised, and so beneficially for the public that it ought not now to be called into question." Even as between states, restrictions may be placed upon non residents, which differ from those imposed on residents, in regard to license charges and other regulations: Allen v. Wycoff 46 N. J. L. R. 90; Geer v. Connecticut, 161 U. S. 519; James v. Wood, 8 L. & R. A. 448, and note.

The authority of the legislature being conceded, and the purpose being so meritorious, then every lawful provision deemed necessary to effect the purpose is within the legislative power. Due process of law is observed in the destruction of fish nets (Lawton v. Steele, supra), in the forfeiture of vessels even though engaged
44 for the coasting trade under the act of congress (Smith v. Maryland, 59 U. S. 71), and in the summary abatement of nuisances and destruction of property. Cards, dice and other articles used for gambling purposes are perfectly harmless in themselves, but may fall under the ban of the law and may be summarily destroyed. Many instances of the use of the police power are to be found in the segre-ation of bawds, and prohibiting the use of public sidewalks by public prostitutes, L'Hote v. New Orleans, 177 U. S. 588, the use of certain sections of a city for the manufacture of fertilizers, Fertilizer Co. v. Hyde Park, 97 U. S. 659, and other like instances have been held to be clearly in the police power; Pittsburg's Petition, 32 Pa. Superior Ct. 210. 4 Thomp. Corps. 5488.

As stated in Barbier v. Connolly, 113 U. S. 27, "Neither the amendment (XIV) broad and comprehensive as it is,—nor any other amendment was designed to interfere with the power of the state, sometimes termed its police power, to prescribe regulations to promote the health, peace, morals, education and good order of the people." We are within the provisions of the constitution when we regulate the manufacture and sale of food stuffs, Com. v. McCann, 14 Pa. Superior Ct. 221; the number of hours adult females should labor, Com. v. Beatty, 15 Pa. Superior Ct. 5; and in prohibiting women and children from working in coal mines, Act of May
45 15, 1893, P. L. 76; in prescribing the qualifications for physicians and undertakers, Com. v. Hanley, 15 Pa. Superior Ct. 271; when musical bands may play in the public streets, Wilkes-Barre v. Garabed, 11 Pa. Superior Ct. 355; when we authorize the killing of dogs following the track of protected game, Com. v.

Frederick, 27 Pa. Superior Ct. 228; and in denying the right to aliens to obtain licenses to sell intoxicating liquors: Tragresser v. Gray, 73 Md. 250; 9 L. R. A. 780.

The creation of the board of game commissioners of the state, whose duty it is to protect and preserve the game, song and insectivorous birds and mammals (Act of June 25, 1895, P. L. 278), and the department of fisheries having charge of the protection, propagation and distribution of fish (Act of April 2, 1903, P. L. 128) are but legislative conclusions that have been reached after more than a century's experience on this subject, and it was deemed necessary and important to add the provisions of the act of 1909 in order to carry out more effectually the provisions of the earlier enactments.

This legislation is not directed against any particular nationality, or special class of aliens, but prohibits "any unnaturalized foreign-born resident" from hunting, capturing or killing any wild bird or animal, and "to that end it shall be unlawful" for such person "to have or be possessed of a shot gun or rifle of any make." The act (May 5, 1864) prohibiting the carrying of concealed weapons is not obnoxious to the bill of rights, saving the right of citizens to
46 bear arms in defense of themselves and the state: Wright v. Com. 77 Pa. 470. Nor does the provision in the fourteenth amendment which declares "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States," affect the defendant in any way, as he is not a citizen.

An alien while domiciled with us is entitled to the protection of the laws and owes in return for this protection a temporary and local allegiance which continues during the period of his residence: 2 Am. & Eng. Enc. of Law, 64. We legislate primarily for our own citizens in granting the special privileges that are independent of our inherent rights. The alien is prohibited from doing many things to which a native born or a naturalized citizen is entitled. He cannot exercise any political rights whatever, nor be compelled to fill any elective or appointive office; he is not qualified to serve as a juror; or to receive a license to sell liquor, hawk or peddle. A non-resident debtor is not entitled to the benefit of our $300 exemption law. Each state has its own exemption laws for the benefit of its own citizens: Collom's App., 12 W. N. C. 309; Bank v. Lowery, 93 U. S. 72; Deni v. Penna. R. R. Co., 181 Pa. 529. The privilege to hunt game has been limited to our citizens, and, as was said in Presser v. Illinois, 116 U. S. 252: "If the plaintiff in error has any such privilege he must be able to point to the provision of the constitution or
47 statutes of the United States by which it is conferred. For as was said by this court in United States v. Cruikshank, 92, U.S. 542, the government of the United States, although it is within the scope of its powers supreme and beyond the states, can neither grant nor secure to its citizens rights or privileges which are not expressly or by implication placed under its jurisdiction. All that cannot be so granted or so secured are left to the exclusive protection of the state."

A state has the same undeniable and unlimited jurisdiction over

all persons and things within its territorial limits as any foreign nation, when the jurisdiction is not surrendered or restrained by the constitution of the United States; by virtue of this it is not only the right but the bounden duty of the state to advance the safety, happiness and prosperity of its people, and to provide for its general welfare by any and every act of legislation which it may deem conducive to these ends: New York v. Miller, 11 Pet. 102. The act of 1909 defines two, several and independent offenses; first, the hunting of game by an alien; second, for an alien to either own or be possessed of a shot gun or rifle of any make. The primary subject of the act is the preservation of wild birds, animals and game, and under all our authorities, the privilege of hunting and taking game is limited, under defined restrictions, to our own citizens. Since long range firearms,—shot-guns and rifles,—are generally used in killing wild birds and animals it is clear that the legislature, in prohibiting a foreign-born, unnaturalized resident from hunting game, intended to make the hunting of game by an alien the more
48 difficult by taking away from such persons the means by which game is usually killed. This prohibition against having deadly and long range firearms does not in any way deprive the alien of property without due process of law, but simply defines and limits his right to use firearms, by restricting such right to the use of short range firearms,—revolvers, and pistols, and such other weapons, as may be necessary for defen seof his person and property.

"Whatever one may claim as a right under the constitution and laws of the United States by virtue of his citizenship, is a privilege of a citizen of the United States. Whatever the constitution and laws of the United States entitle him to exemption from, he may claim as an exemption in respect to, and such a right or privilege is abridged whenever the state law interferes with any legitimate operation of federal authority which concerns his interest, whether it be an authority actively exerted, or resting only in the express or implied command or assurance of the federal constitution or law. But the United States can neither grant nor secure to its citizens rights or privileges which are not expressly or by reasonable implication placed under its jurisdiction, and all not so placed are left to the exclusive protection of the states." Cooley's Principles, pp. 245-247. See also Bryce's American Commonwealth, p. 406.

This defendant is not a citizen of the United States nor of this Commonwealth. While he is within our jurisdiction he is
49 entitled to the equal protection of the laws, subject to the limitations of the class of which he is a member. He is one of a very large class of aliens, whose sojourn in the country is but temporary and whose place of abode is capricious and uncertain, who cannot speak our language nor understand our customs or laws, who pay no taxes and share no part of the public burden. Under all our decisions his right to remain among us is subject to the limitations imposed upon all of his class: Tragresser v. Gray, supra; 1 Bouvier's Law Dict., title Alien; I Am. & Eng. Ency. of Law, 64. "Equal protection of the laws" cannot be said to be denied whenever the law operates alike upon all persons and property similarly situated;

Barbier v. Connolly, 113 U. S. 32; Walston v. Nevin, 128 U. S. 578. And in determining what is due process of law, we are bound to consider the nature of the property, the necessity for its sacrifice, and the extent to which it has heretofore been regarded as within the police power * * * So far as it is dangerous to the safety or health of the community, due process of law authorize its summary destruction: Santell v. R. R. Co., 164 U. S. 701; Com. v. McComb, 39 Pa. Superior Ct. 411; In re Campbell, 197 Pa. 583.

This act of 1909 is not in contravention of the existing treaty between the kingdom of Italy and the United States. The rule of construction to be followed in such a case has but recently been considered by our Supreme Court in Deni v. Penna. R. R. Co.
50 181 Pa. 525 and Maiorano v. B. & O. R. R. Co., 216 Pa. 402,

By art. II of the treaty between these countries "the citizens of each of the high contracting parties have liberty to travel in the states and territories of the other, to carry on trade, wholesale and retail, to hire and occupy houses and warehouses, to employ agents of their choice and generally to do anything incident to or necessary for trade upon the same terms as natives of the country, submitting themselves to the laws then established." And Art. III provides: "The citizens of each of the high contracting parties shall receive, in the states and territories of the other, the most constant protection and security for their persons and property, and shall enjoy in this respect the same rights and privileges as are or shall be granted to the natives on their submitting themselves to the conditions imposed upon the natives." As held in the last-cited case, "In construing a treaty the general rule obtains that the court is to be guided by the intention of the parties, and if the words clearly express the meaning and intention no other means of interpretation can be employed." Is it a reasonable construction to hold that it was intended to clothe unnaturalized foreign-born residents with the same rights, immunities, and advantages as are conferred solely as a privilege on citizens? The whole trend of our decisions is against such an interpretation. The terms of the treaty provide for the protection and security of their persons and property, and in this respect,—to such protection
and security,—the enjoyment of the same rights and privi-
51 leges as are or shall be granted to the natives on their submitting themselves to the conditions imposed on the natives.

An unnaturalized foreign-born resident cannot comply with the conditions imposed on a native born or naturalized resident. Article XIV of the federal constitution defines this condition: "All persons born or naturalized in the United States and subject to the jurisdiction thereof are citizens of the United States, and of the states wherein they reside." It would be a perversion of language to hold that the phrase,—the same rights or privileges as are or shall be granted to the natives,—was intended to or could embrace all the regulations affecting our franchise rights; the administration and execution of our laws, the special rights granted as privileges by our government to particular classes of our citizens. Such a construction would render nugatory the qualification for president of the United States as provided by art. II sec. 1, par. 40, of our federal constitution and

other limitations that are made equally explicit in our fundamental law.

The assignments of error are overruled and the judgment is affirmed.

52 COMMONWEALTH OF PENNSYLVANIA,
County of Allegheny, ss:

I, George Pearson, Prothonotary of the Superior Court of Pennsylvania, sitting at Pittsburgh, the said Court being a Court of Record, do hereby certify that the foregoing is a true and correct copy of the whole and entire opinion in the case of Commonwealth of Pennsylvania vs. Joseph Patsone at No. 162 April Term, 1910 as full, entire and complete as the same remains on file in the said Superior Court, in the case there stated; and I do hereby further certify that the foregoing has been compared by me with the original record in said cause in my keeping and custody as the Prothonotary of said Court, and that the foregoing is a correct transcript from said record, and of the whole of the original thereof.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said Court, at Pittsburgh, in the County of Allegheny, sitting at Pittsburgh, as aforesaid, this 25th day of May in the year of our Lord One Thousand Nine Hundred and eleven.

[Seal of the Superior Court of Pennsylvania, Western District.]

GEORGE PEARSON,
Prothonotary.

[Endorsed:] No. 162, April Term, 1910. Commonwealth of Pennsylvania vs. Joseph Patsone, Appellant. Exemplification.

53 No. —, —— Term, 1910. In the Supreme Court of Pennsylvania. Commonwealth of Pennsylvania vs. Joseph Patsone. Petition of Joseph Patsone for leave to appeal from the Superior Court. Oct. 22, 1910, Petition granted. Filed October 18, 1910. Supreme Court, W. D. H. F. Stambaugh, Marcel A. Viti.

54 In the Supreme Court of Pennsylvania.

No. —, —— Term, 1910.

COMMONWEALTH OF PENNSYLVANIA
vs.
JOSEPH PATSONE.

Petition of Joseph Patsone for Leave to Appeal from the Judgment of the Superior Court, as of April Term, 1910, No. 162.

To the Honorable the Justices of the Supreme Court of Pennsylvania:

The Petition of Joseph Patsone, respectfully represents:

1. That on the Nineteenth day of October, 1909, he was arrested in the County of Allegheny, in the State of Pennsylvania, charged

with owning and having in his possession a shot-gun in violation of the provisions of the act of May 8, 1909, P. L. 466, entitled, "An Act to give additional protection to wild birds and animals and game within the Commonwealth of Pennsylvania; prohibiting the hunting for, or capture or killing of, such wild birds or animals or game by unnaturalized foreign-born residents; forbidding the ownership or possession of shotgun or rifle by any unnaturalized and foreign born resident, within the Commonwealth of Pennsylvania; and prescribing penalties for violation of its provisions," and on the said Nineteenth day of October, 1909, after hearing before U. G. McMurray, a Justice of the Peace of Allegheny County, he was summarily convicted on the charge brought against him and sentenced to pay a fine of Twenty five dollars and costs or to suffer imprisonment in the County Jail of Allegheny County one day for each dollar of penalty imposed.

2. On the twenty third day of October, 1909, your petitioner presented his petition to the Court of Quarter Sessions of Allegheny County for leave of appeal from the judgment and sentence rendered against him and on the same day the Court of Quarter Sessions made an order allowing your petitioner to appeal.

3. The appeal of your petitioner came on to be heard before the said court of Quarter Sessions of Allegheny County, and on the fourth day of December, 1909, the said court confirmed the judgment of summary conviction against your petitioner, holding that the Act of Assembly under which he had been arrested, convicted and fined, was constitutional.

4. From the order and judgment of the Court of Quarter Sessions of Allegheny County your petitioner appealed to the Superior Court of Pennsylvania and that court on the tenth day of October, 1910, confirmed the judgment of the Court of Quarter Sessions of Allegheny County in an opinion, a copy of which is hereto annexed.

5. Your petitioner is advised by counsel, and therefore avers, that the said Act of Assembly of May 8th, 1909, P. L. 466, is unconstitutional and that his arrest, conviction and sentence thereunder were unlawful, and that the Superior Court of Pennsylvania erred in confirming the judgment of the court of Quarter Sessions of Allegheny County.

The act of May 8th, 1909, is unconstitutional in the following respects:

(*a*) Said act contains two distinct subjects and the subject matter of it is not clearly set forth in the title, in violation of Article III Section 3 of the Constitution of Pennsylvania.

(*b*) Said act is a special law regulating the practice and jurisdiction and changing the rules of evidence in a judicial proceeding or inquiry before Justices of the Peace, in violation of Article III, Section 7 of the Constitution of Pennsylvania.

(*c*) Said act deprives persons of property without due process of law, and denies to them the equal protection of the laws, in violation of the Fourteenth Amendment of the Constitution of the United States.

(d) Said act is in violation of the existing treaty between the Kingdom of Italy and the United States, concluded February 26th, 1871, by the terms of which Italian citizens, while sojourning in any of the United States, are guaranteed the same protection for
57 their persons and property and are granted the same rights and privileges as the citizens of the United States.

6. Your petitioner respectfully representing the premises prays that he may be permitted to appeal from the judgment of the Superior Court to the Supreme Court of Pennsylvania.

JOSEPH PATSONE,
By H. F. STAMBAUGH, *Attorney.*

COMMONWEALTH OF PENNSYLVANIA,
County of Allegheny, ss:

Before me personally appeared Harry F. Stambaugh, who being duly sworn according to law, deposes and says that he was of counsel for the appellant in the above case, and is familiar with the facts set forth in the foregoing petition, and that the statements made therein are true and correct, to the best of his knowledge, information and belief.

HARRY F. STAMBAUGH.

Sworn to and subscribed before me this 18th day of October, A. D. 1910.

GEO. PEARSON,
Prothonotary.

58 No. 162, April Term, 1910. Commonwealth vs. Patsone. Order to retain record. Filed Oct. 18, 1910. Supreme Court, W. D.

59 No. 162, April Term, 1910.

COMMONWEALTH
VS.
PATSONE.

And now, to wit, October 18th, 1910, the Prothonotary is directed to retain the record in the above case pending the consideration of the application of the appellant for the allowance of an appeal from the judgment of the Superior Court.

W. P. POTTER,
Justice of the Supreme Court.

60 *Supreme Court Docket Entries.*

No. 162, of April Term, 1910.

COMMONWEALTH OF PENNSYLVANIA
vs.
JOSEPH PATSONE, Appellant.

Appeal from Superior Court at Quarter Sessions, Allegheny County, at No. 27, of October Sessions, 1909.

October	22, 1910.	Appeal allowed. Appeal and affidavit filed and Writ exit October 26, 1910.
October	26, 1910.	Record filed.
December	6, 1910.	Transferred for hearing at Philadelphia as per Rule of May 24, 1910.
Eo Die.		Record sent to Eastern District.
Dec.	13, 1910.	Petition for allowance of appeal and order thereon sent to Eastern District.
December	20, 1910.	Assignments of error filed in Eastern District.
January	16, 1911.	Argued.
March	20, 1911.	Judgment affirmed. Per Curiam.
March	21, 1911.	Record and all papers received from Eastern District.
March	30, 1911.	Remitted.
May	19, 1911.	Præcipe for Supplemental Certiorari filed.
Eo Die.		Certiorari exit.

61 In the Supreme Court of Pennsylvania for the Western District.

Superior Court of Pennsylvania, Sitting at Pittsburgh.

No. 162, of April Term, 1910.

COMMONWEALTH OF PENNSYLVANIA
vs.
JOSEPH PATSONE, Appellant.

Enter Appeal on behalf of Joseph Patsone from the judgment of the Superior Court of Pennsylvania, sitting at Pittsburgh, as per order of Supreme Court, allowing said Appeal, filed 22nd day of October 1910.

HARRY F. STAMBAUGH,
MARCEL A. VITI,
Attorneys for Appellant.

To George Pearson, Proth'y Sup. Ct. W. D.

COUNTY OF ALLEGHENY, ss:

Harry F. Stambaugh being duly sworn, saith that the above Appeal is not intended for delay, but because Appellant believes he has suffered injustice by the judgment from which he appeals.

HARRY F. STAMBAUGH.

Sworn and subscribed before me this 26" day of October A. D. 1910.

GEO. PEARSON,
Prothonotary.

[Endorsed:] No. 20, October Term, 1910. Supreme Court of Pennsylvania, Western District. Commonwealth of Pennsylvania vs. Joseph Patsone, Appellant. Appeal and Affidavit. Filed Oct. 26, 1910, Supreme Court, Fifth District. Harry F. Stambaugh, Marcel A. Viti, Attorneys for Appellant.

62 WESTERN DISTRICT OF PENNSYLVANIA,
County of Allegheny, ss:

The Commonwealth of Pennsylvania to the Judges of the Superior Court, Greeting:

Whereas, Commonwealth of Pennsylvania plaintiff impleaded Joseph Patsone defendant, in the Court of Quarter Sessions of Allegheny County, to No. 27 October Term, 1909, and thereupon it was so proceeded in that judgment was entered in said Court for the said Plaintiff and, Whereas, upon appeal to the Superior Court, the said judgment was affirmed as of No. 162 April Term, 1910, and Whereas, thereupon, to wit, on the 22" day of October 1910, upon due cause shown, an appeal to this Court was allowed,

Now, Therefore, We being will to be certified of the matter of the said appeal, Do Command You, that the record and proceedings aforesaid, with all things touching the same, before the Justices of our Supreme Court of Pennsylvania, at a Supreme Court to be holden at Pittsburgh, in and for the Western District, the first Monday of November 1910, so full and entire as in your Court before you they remain, you certify and send, together with this writ, that we may further cause to be done thereupon that which of right and according to the laws of the said State ought.

Witness the Honorable D. Newlin Fell, Doctor of Laws, Chief Justice of our said Supreme Court, at Pittsburgh, the twenty-sixth day of October in the year of our Lord one thousand nine hundred and ten.

[Seal of the Supreme Court of Pennsylvania, Western District.]

GEORGE PEARSON,
Prothonotary.

[Endorsed:] No. 20, of October Term, 1911. Supreme Court. Commonwealth vs. Joseph Patsone, Appellant. Certiorari to the Superior Court. Returnable the first Monday of October, A. D.

1910. Rule on the Appellee, to appear and plead on the Return-day of the Writ. Geo. Pearson, Prothonotary. Harry F. Stambaugh, Attorneys for Appellant. Filed March 30th, 1911.

To the Honorable the Justice of the Supreme Court of the Commonwealth of Pennsylvania, sitting in and for the Western District:

The record and process, and all things touching the same, so full and entire as before us they remain, we certify and send, as within we are commanded.

CHARLES E. RICE, [L. S.]
President Judge.

63 In the Supreme Court of Pennsylvania.

No. 20, October Term, 1911.

COMMONWEALTH OF PENNSYLVANIA
vs.
JOSEPH PATSONE, Appellant.

Assignments of Error to Judgment of Superior Court.

And now, December 20th, 1910, comes Joseph Patsone by Marcel A. Viti, his attorney, and in connection with his appeal from the judgment of the Superior Court in the above case, made and entered on October 10th, 1910, makes and files the following assignments of error.

(1) The learned Superior Court erred in making the following order:

"The assignments of error are overruled and the judgment is affirmed."

(2) The learned Superior Court erred in affirming the judgment of the Court of Quarter Sessions of the County of Allegheny.

(3) The learned Superior Court erred in not deciding that the act of May 8th, 1909, P. L. 466, entitled, "An act to give addi-
64 tional protection to wild birds and animals and game; within the Commonwealth of Pennsylvania; prohibiting the hunting for, or capture or killing of, such wild birds or animals or game by unnaturalized foreign-born residents; forbidding the ownership or possession of shotgun or rifle by any unnaturalized foreign born resident, within the Commonwealth; and prescribing penalties for violation of its provisions," is unconstitutional.

(4) The learned Superior Court erred in not sustaining the first assignment of error to the judgment of the Quarter Sessions, to wit:

First. The learned court erred in not holding the act of May 8th, 1909, unconstitutional and void because in conflict with Article III, Section 3, of the Constitution of Pennsylvania.

(5) The learned Superior Court erred in not sustaining the second assignment of error to the judgment of the Quarter Sessions, to wit:

Second. The learned Court erred in not holding the Act of May

8th, 1909, unconstitutional and void because in conflict with Article III, Section 7, sub-division 19 of the Constitution of Pennsylvania.

(6) The learned Superior Court erred in not sustaining the third assignment of error to the judgment of the Quarter Sessions, to wit:

65 Third. The learned court erred in not holding the Act of May 8th, 1909, is unconstitutional and void because it violates the Fourteenth Amendment to the Constitution of the United States.

(7) The learned Superior Court erred in not sustaining the fourth assignment of error to the judgment of the Quarter Sessions, to wit:

Fourth. The learned court erred in not holding that the act of May 8th, 1909, is unconstitutional and void because it violates the provision of the Fourteenth Amendment to the constitution of — United States, which forbids a state to deprive any person of life, liberty or property without due process of law.

(8) The learned Superior Court erred in not sustaining the fifth assignment of error to the judgment of the Quarter Sessions, to wit:

Fifth. The learned court erred in not holding that the Act of May 8th, 1909, is unconstitutional and void because it violates the provision of the Fourteenth Amendment to the Constitution of the United States, which forbids a state to deprive any person of the equal protection of the laws.

(9) The learned Superior Court erred in not sustaining the sixth assignment of error to the judgment of the Quarter Sessions, to wit:

66 Sixth. The learned Court erred in not holding that the act of May 8th, 1909, is unconstitutional and void because it is in contravention of the existing treaty of Commerce and Navigation between the United States and the Kingdom of Italy.

10. The learned Superior Court erred in not sustaining the seventh assignment of error to the judgment of the Quarter Sessions, to wit:

Seventh. The learned Court erred in not holding that the act of May 8th, 1909, is unconstitutional and void because it is in contravention of Article II of the existing treaty of Commerce and Navigation between the United States and the Kingdom of Italy.

11. The learned Superior Court erred in not sustaining the eighth assignment of error to the judgment of the Quarter Session-, to wit:

Eighth. The learned Court erred in not holding that the act of May 8th, 1909, is unconstitutional and void because it is in contravention of Article III of the existing treaty of Commerce and Navigation between the United States and the Kingdom of Italy.

12. The learned Superior Court erred in not sustaining the ninth assignment of error to the judgment of the Quarter Sessions, to wit:

67 Ninth. The learned court erred in holding "that the Act under which the defendant was found guilty was clearly within the powers of the Legislature of the State."

(13) The learned Superior Court erred in not sustaining the tenth assignment of error to the judgment of the Quarter Sessions, to wit:

Tenth. The learned court erred in entering the following judg-

ment, viz: "After hearing the evidence and arguments of *several* the defendant is adjudged guilty."

MARCEL A. VITI,
Attorney for Appellant.

68 In the Supreme Court of Pennsylvania. No. 20, October Term 1911. Commonwealth of Pennsylvania vs. Joseph Patsone, Appellant. Assignments of error. Filed Dec. 20, 1910. In Supreme Court. Marcel A. Viti.

69 In the Supreme Court of Pennsylvania, Western District, October Term, 1911.

No. 20.

COMMONWEALTH OF PENNSYLVANIA
vs.
JOSEPH PATSONE.

Appeal from Superior Court. Appeal Q. S. Allegheny County.

Filed March 20, 1911.

Per Curiam:

The judgment of the Superior Court is affirmed on the opinion of Judge Orlady.

70 COMMONWEALTH OF PENNSYLVANIA,
County of Allegheny, ss:

I, George Pearson, Prothonotary of the Supreme Court of Pennsylvania, in and for the Western District thereof, the said Court being a Court of Record, do hereby certify that the foregoing is a true and correct copy of the whole and entire opinion in the case of Commonwealth of Pennsylvania vs. Joseph Patsone at No. 20, October Term, 1911, as full, entire and complete as the same remains on file in the said Supreme Court, in the case there stated; and I do hereby further certify that the foregoing has been compared by me with the original record in said cause in my keeping and custody as the Prothonotary of said Court and that the foregoing is a correct transcript from said record and of the whole of the original thereof.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of the said Court, at Pittsburgh, in the County of Allegheny, in the said Western District of Pennsylvania, this 30th day of March in the year of our Lord One Thousand Nine Hundred and Eleven.

[Seal of the Supreme Court of Pennsylvania, Western District, 1776.]

GEORGE PEARSON,
Prothonotary.

[Endorsed:] No. 20, October Term, 1911. Commonwealth of Pennsylvania vs. Joseph Patsone, Appellant. Exemplification.

71 WESTERN DISTRICT OF PENNSYLVANIA,
County of Allegheny, ss:

The Commonwealth of Pennsylvania to the Judges of the Court of Quarter Sessions for the County of Allegheny, Greeting:

Whereas, By virtue of our Writ of Certiorari to No. 20 of October Term, 1911, of our Court, a record in the matter of the appeal of Joseph Patsone from the judgment of your said Court at No. 27 of October Term, A. D. 1909, was brought into our Supreme Court, and the said cause was there so proceeded in that on the 20 day of March A. D. 1911 the following decision was rendered, viz:

The judgment of the Superior Court is affirmed on the opinion of Judge Orlady. Per Curiam.

Wherefore, We hereby remit you the record aforesaid with the proceedings thereon, and all things touching the same so far as in this Court they remain, for the purpose of execution as to justice shall appertain, in accordance with the decision of our said Supreme Court as aforesaid.

Witness the Honorable D. Newlin Fell, Doctor of Laws, Chief Justice of our Supreme Court at Pittsburgh, the 30th day of March in the year of our Lord one thousand nine hundred and eleven.

[Seal of the Supreme Court of Pennsylvania, Western District, 1776.]

GEORGE PEARSON,
Prothonotary.

[Endorsed:] No. 20, October Term, 1911. Supreme Court. Commonwealth vs. Joseph Patsone, Appellant. Remittitur. Filed March 30th, 1911. Costs: Attorney, $3.—; writ, $—.

72 In the Supreme Court of Pennsylvania, for the Western District.

Court of Quarter Sessions, County of Allegheny, October Term, 1909.

No. 27.

COMMONWEALTH OF PENNSYLVANIA
vs.
JOSEPH PATSONE.

Supplemental Certiorari.

Issue Certiorari to the Court of Quarter Sessions of the County of Allegheny to remove the record and proceedings in a certain action in the said Court at above number and term between the parties hereinbefore recited. The record aforesaid being required by the Supreme Court for further proceedings therein, as provided by Section 18 of the Act approved 19 May, 1897, P. L. 67.

HARRY F. STAMBAUGH,
Attorney for Appellant.

To George Pearson, Prothonotary Supreme Court, Western District.

[Endorsed:] No. 20, October Term, 1911. Supreme Court of Pennsylvania, Western District. Commonwealth of Pennsylvania vs. Joseph Patsone, Appellant. Præcipe for Certiorari. Harry F. Stambaugh, Attorney for ——.

73 Copy.

Supplemental Certiorari.

THE SUPREME COURT OF PENNSYLVANIA,
Western District, County of Allegheny, ss:

The Commonwealth of Pennsylvania to the Judges of the Court of Quarter Sessions, No. —, for the County of Allegheny, Greeting:

We being willing for certain further proceedings in the Supreme Court in the matter of appeal of Joseph Patsone from the judgment of your said Court, at No. 27 of October Term, A. D., 1909 wherein the Commonwealth of Pennsylvania is Plaintiff and the said Appellant is Defendant before you, or some of you, depending, Do Command You, that the record and proceedings aforesaid, with all things touching the same, before the Justices of our Supreme Court of Pennsylvania, at a Supreme Court to be holden at Pittsburgh, in and for the Western District, forthwith, so full and entire as in your Court before you they remain, you certify and send, together with this Writ, that we may further cause to be done thereupon that which of right and according to the laws of the said State ought, as provided in section 18 of Act approved 19 May, 1897, P. L. 67.

Witness the Honorable James T. Mitchell, Doctor of Laws, Chief Justice of our said Supreme Court, at Pittsburgh, the 19" day of May in the year of our Lord one thousand nine hundred and eleven.

[SEAL.] (Signed) GEORGE PEARSON,
Prothonotary.

[Endorsed:] No. 20, of October Term, 1911. Supreme Court. Commonwealth of Pennsylvania v. Joseph Patsone, Appellant. Supplemental Certiorari to the Court of Quarter Sessions No. —, for the County of Allegheny. Returnable forthwith. Rule on the Appellee to appear and plead on the Return Day of the Writ. Signed Geo. Pearson, Prothonotary. Harry F. Stambaugh, Marcel A. Viti. Attorneys for Appellant.

To the Honorable the Justices of the Supreme Court of the Commonwealth of Pennsylvania, sitting in and for the Western District:

The record and process, and all things touching the same, so full and entire as before us they remain, we certify and send, as within we are commanded.

—— ——. [L. S.]
—— ——. [L. S.]

74 COMMONWEALTH OF PENNSYLVANIA,
County of Allegheny, ss:

I, George Pearson, Prothonotary of the Supreme Court of Pennsylvania, in and for the Western District thereof, the said Court being a Court of Record, do hereby certify that the foregoing is a true and correct copy of the whole and entire Record in the case of Commonwealth of Pennsylvania vs. Joseph Patsone at No. 20 October Term, 1911 as full, entire and complete as the same remains on file in the said Supreme Court, in the case there stated; and I do hereby further certify that the foregoing has been compared by me with the original record in said cause in my keeping and custody as the Prothonotary of said Court and that the foregoing is a correct transcript from said record and of the whole of the original thereof.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of the said Court, at Pittsburgh, in the County of Allegheny, in the said Western District of Pennsylvania, this 25th day of May in the year of our Lord One Thousand Nine Hundred and eleven.

[Seal of the Supreme Court of Pennsylvania, Western District.]

GEORGE PEARSON,
Prothonotary.

[Endorsed:] Exemplification.

75 I, D. Newlin Fell Chief Justice of the Supreme Court of Pennsylvania, Do Certify, that George Pearson was at the time of signing the annexed attestation and now is Prothonotary of the said The Supreme Court of Pennsylvania, in and for the Western District, to whose acts as such full faith and credit are and ought to be given; and that the said attestation is in due form.

In Witness Whereof, I have hereunto subscribed my name this 25th day of May in the year of our Lord one thousand nine hundred and eleven. D. NEWLIN FELL.

I, George Pearson, Prothonotary of the Supreme Court of Pennsylvania in and for the Western District, Do Certify, that the Honorable D. Newlin Fell by whom the foregoing Certificate was made and given, was at the time of making and giving the same and is now Chief Justice of the Supreme Court of Pennsylvania; to whose acts as such full faith and credit are and ought to be given, as well in Courts of Judicature as elsewhere; and that his signature, thereto subscribed, is genuine.

In Testimony Whereof, I have hereunto set my hand and affixed the Seal of the said The Supreme Court of Pennsylvania, in and for the Western District, at Pittsburgh, this 25th day of May in the year of our Lord one thousand nine hundred and eleven.

GEORGE PEARSON.

76 Supreme Court of the United States. No. —, —— Term, 191–. Joseph Patsone, Plaintiff in error, vs. Commonwealth of Pennsylvania, Defendant in error. Assignments of Error. Filed May 16, 1911, Supreme Court, W. D. Marcel A. Viti.

77 Supreme Court of the United States.

No. —, —— Term, 191–.

JOSEPH PATSONE, Plaintiff in Error,
vs.
COMMONWEALTH OF PENNSYLVANIA.

Assignments of Error.

And now, May 6th 1911, before the Justices of said Court comes Joseph Patsone, plaintiff in error, by Marcel A. Viti, his attorney, and says that in the record aforesaid there is error in the following particulars:

(1) The Supreme Court of Pennsylvania erred in making the following order, viz: "The judgment of the Superior Court is affirmed on the opinion of Judge Orlady."

(2) The Supreme Court of Pennsylvania erred in affirming the judgment of the Superior Court of Pennsylvania affirming the judgment of the Court of Quarter Sessions of Allegheny County, viz: "After hearing the evidence and arguments of several, the defendant is adjudged guilty."

(3) The Supreme Court of Pennsylvania erred in not deciding that the Act of May 8th, 1909, P. L. 466, entitled "An Act to give additional protection to wild birds and animals and game,
78 within the Commonwealth of Pennsylvania; prohibiting the hunting for, or capture or killing of, such wild birds or animals or game by unnaturalized foreign-born residents; forbidding the ownership or possession of shotgun or rifle by any unnaturalized foreign-born resident, within the Commonwealth; and prescribing penalties for violation of its provisions" is unconstitutional.

(4) The Supreme Court of Pennsylvania erred in not holding the Act of May 8th, 1909, P. L. 466, unconstitutional and void because it violates the Fourteenth Amendment to the Constitution of the United States.

(5) The Supreme Court of Pennsylvania erred in not holding the Act of May 8th 1909, P. L. 466, unconstitutional and void because it violates the provision of the Fourteenth Amendment to the Constitution of the United States, which forbids a state to deprive any person of life, liberty or property without due process of law.

(6) The Supreme Court of Pennsylvania erred in not holding the Act of May 8th 1909, P. L. 466, unconstitutional and void because it violates the provisions of the Fourteenth Amendment to the Constitution of the United States, which forbids a state to deprive any person of the equal protection of the laws.

(7) The Supreme Court of Pennsylvania erred in not holding the Act of May 8th, 1909, P. L. 466, unconstitutional and void because it is in contravention of the existing treaty of Commerce and Navigation between the United States and the Kingdom of Italy.

79 (8) The Supreme Court of Pennsylvania erred in not holding the Act of May 8th 1909, P. L. 466, unconstitutional and void because it is in contravention of Article II of the existing treaty of Commerce and Navigation between the United States and the Kingdom of Italy.

(9) The Supreme Court of Pennsylvania erred in not holding the Act of May 8th 1909, P. L. 466, unconstitutional and void because it is in contravention of Article III of the existing treaty of Commerce and Navigation between the United States and the Kingdom of Italy.

Wherefore the plaintiff in error prays that the judgment aforesaid, for the errors aforesaid and other errors in the record and proceedings aforesaid, as the same more fully appears therein, may be reversed and annulled.

(Signed) MARCEL A. VITI,
Attorney for Plaintiff in Error.

80 In the Supreme Court of Pennsylvania, Western District, October Term, 1911.

No. 20.

COMMONWEALTH OF PENNSYLVANIA
vs.
JOSEPH PATSONE.

To the Honorable (Edward D. White, Chief Justice of) the Supreme Court of the United States:

The Petition of Joseph Patsone respectfully represents:

(1) On the 19th day of October, 1909, before U. G. McMurray, a Justice of the Peace of Allegheny County, Pennsylvania, your Petitioner was summarily convicted of having in his possession a shotgun in violation of the provisions of the Act of May 8th, 1909, P.L. 466, entitled, "An Act to give additional protection to wild birds and animals and game, within the Commonwealth of Pennsylvania; prohibiting the hunting for, or capture or killing of, such wild birds or animals or game by unnaturalized foreign-born residents; forbidding the ownership or possession of shotgun or rifle by any unnaturalized foreign-born resident within the Commonwealth of Pennsylvania; and prescribing penalties for violation of its provisions," and he was sentenced to pay a fine of twenty-five dollars and costs or to suffer imprisonment in the County jail of Allegheny County one day for each dollar of penalty imposed.

(2) Your Petitioner appealed to the Court of Quarter Sessions of Allegheny County, as of No. 27, October Sessions, 1909, al-
81 leging that the said Act of Assembly was unconstitutional and on the 4th day of December, 1909, the said Court adjudged your Petitioner guilty, holding that the Act of Assembly under which he had been convicted was constitutional and within the power of the legislature.

(3) From the order and judgment of the Court of Quarter Sessions of Allegheny County your Petitioner appealed to the Superior Court of Pennsylvania, as of No. 162, April Term, 1910, and assigned as error inter alia that the said statute violated the Fourteenth Amendment to the Constitution of the United States in that it deprived persons of liberty and property without due process of law and denied them the equal protection of the laws and also that the said statute was in contravention of Articles II and III of the existing treaty of Commerce and Navigation between the United States and the kingdom of Italy, of which country your Petitioner is a subject. On the 10th day of October, 1910, the said Superior Court, in an opinion filed, held that the said Act was constitutional and the judgment of the Court below was affirmed, as will more fully appear by the said opinion, a copy of which is hereto annexed.

(4) From the decision of the Superior Court your petitioner appealed to the Supreme Court of Pennsylvania, as of No. 20, October Term, 1911, and assigned as error inter alia that the Superior Court erred in not sustaining the assignments of error hereinbefore specified to the judgment of the Court of Quarter Sessions, viz: that the said Act was in violation of the rights guaranteed by the Fourteenth Amendment of the Constitution of the United States and the treaty between the United States and the kingdom of Italy. On the 20th day of March, 1911, the Supreme Court of Pennsylvania affirmed the judgment of the Court below, a copy of which judgment is hereto annexed.

(5) Your Petitioner avers that the said judgment of the Supreme Court of Pennsylvania is the judgment of the highest court of the State of Pennsylvania and is final.

82 (6) Your petitioner herewith presents a certified copy of the record in the said case and avers that the said judgment of the Supreme Court of Pennsylvania is in violation of the rights, privileges and immunities claimed by and guaranteed by your Petitioner under the provisions of the Constitution of the United States and the treaty between the United States and the kingdom of Italy as hereinbefore set out.

Wherefore your petitioner prays that a writ of error be allowed to the Supreme Court of Pennsylvania, in order that the judgment of the said Court may be reviewed and reversed or affirmed in the Supreme Court of the United States.

And your Petitioner will ever pray.

JOSEPH PATSONE,
By MARCEL A. VITI, *Attorney.*

COMMONWEALTH OF PENNSYLVANIA,
County of Philadelphia, ss:

Marcel A. Viti, being duly sworn according to law, deposes and says that he was counsel for the Petitioner in the above case and is familiar with the facts set forth in the foregoing petition, and that the statements made therein are true and correct to the best of his knowledge, information and belief.

MARCEL A. VITI.

Sworn to and subscribed before me this 27 day of April, A. D. 1911.

[Seal Henry S. Borneman, Notary Public, Philadelphia, Pa.]

HENRY S. BORNEMAN,
Notary Public.

Commission Expires March 8, 1913.

83 *Copy of Opinion of the Superior Court.*

Opinion by Orlady, J., October 10, 1910.

The defendant, an unnaturalized foreign-born resident of this commonwealth, was adjudged guilty of violating the provisions of the Act of May 8, 1909, P. L., 466,—in owning and having in his possession a double-barreled shotgun. The facts are not in dispute, and it is conceded that the proceedings in the summary conviction before the justice of the peace, and on appeal in the court of quarter sessions, were regular. The principal contention is, that the provisions of this act are in violation of the stipulations of the fourteenth amendment of the federal constitution, viz: "Nor shall any state deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

The act in question is entitled: "An act to give additional protection to wild birds and animals and game, within the commonwealth of Pennsylvania: prohibiting the hunting for, or capture or killing of such wild birds or animals or game by unnaturalized foreign-born residents; forbidding the ownership or possession of shotgun or rifle by any unnaturalized foreign-born resident, within the commonwealth, and prescribing penalties for violation of its provisions." The first section provides: "It shall be unlawful for any unnaturalized foreign-born resident to hunt for or capture or kill, in this commonwealth, any wild bird or animal, either game or otherwise of any description, excepting in defense of person or property; and to that end, it shall be unlawful for any unnaturalized foreign-born resident within this commonwealth to either own or be possessed of a shotgun or rifle of any make. Each and every person violating any provision of this section shall, upon conviction thereof, be sentenced to pay a penalty of twenty-five dollars for each offense, or undergo imprisonment in the common jail of the county
84 for the period of one day for each dollar of penalty imposed: Provided, that in addition to the above-named penalty, all guns of the before-mentioned kinds found in the possession or under control of an unnaturalized foreign-born resident shall, upon conviction of such person, or upon his signing a declaration of guilt as prescribed by this act, be declared forfeited to the commonwealth of Pennsylvania, and shall be sold by the board of game commissioners as hereinafter directed." The third section provides: "That the possession of a shotgun or rifle at any place outside of buildings

within this commonwealth, by an unnaturalized foreign-born resident, shall be conclusive proof of a violation of the provisions of section one of this act, and shall render any person convicted thereof liable to the penalty as fixed by said section." And the fourth section: "That the presence of a shotgun or rifle in a room or house, or building or tent, or camp of any description, within this commonwealth, occupied or controlled by an unnaturalized foreign-born resident, shall be prima facie evidence that such gun is owned or controlled by the person occupying or controlling the property in which such gun is found, and shall render such person liable to the penalty imposed by section one of this act."

As stated by the learned trial judge: "The right to hunt game is but a privilege given by the legislature, and is not an inherent right in the residents of the state. Wild animals and game of all sorts have from time immemorial been the property of the sovereign, and in Pennsylvania the property of the state. Its power to regulate and prohibit the hunting and killing of game has always been conceded." This subject has been a fruitful source of legislation, and the frequent changes in our game and fish laws represent a zealous intention to define and supervise wild birds, animals, game and fish; to regulate how they are to be preserved and taken, declare the open and closed season when they may be taken; the manner and amount of the killing; and the device, implement and method permitted: Com. v. Immel, 33 Pa. Superior Ct. 388; Com. v. McComb, 39 Pa. Superior Ct. 411.

85 In Lawton v. Steele, 152 U. S. 133, the supreme court of the United States declared: "The preservation of game and fish, has always been treated as within the proper domain of the police power, and laws limiting the season within which birds and wild animals may be killed and exposed for sale, and prescribing the time and manner in which fish may be caught, have been repeatedly upheld by the court * * * it is within the authority of the legislature to impose restrictions and limitations upon the time and manner of taking fish and game, considered valuable as articles of food or merchandise. The power to enact such laws has long been exercised, and so beneficially for the public that it ought not now to be called into question." Even as between states, restrictions may be placed upon nonresidents, which differ from those imposed on residents, in regard to license charges and other regulations: Allen v. Wyckoff, 48 N. J. L. 90; Geer v. Connecticut, 161 U. S. 519; James v. Wood, 8 L. R. A. 448, and note.

The authority of the legislature being conceded, and the purpose being so meritorious, then every lawful provision deemed necessary to effect the purpose is within the legislative power. Due process of law is observed in the destruction of fish nets (Lawton v. Steele, 152 U. S. 153), in the forfeiture of vessels even though engaged for the coasting trade under the act of congress (Smith v. Maryland, 59 U. S. 71), and in the summary abatement of nuisances and destruction of property. Cards, dice and other articles used for gambling purposes are perfectly harmless in themselves, but may fall under the

ban of the law and may be summarily destroyed. Many instances of the use of the police power are to be found (the segregation of bawds, and prohibiting the use of public sidewalks by public prostitutes, L'Hote v. New Orleans, 177 U. S. 587), the use of certain sections of a city for the manufacture of fertilizers (Fertilizer Co. v. Hyde Park, 97 U. S. 659), and other like instances have been held to be clearly within the police power: Pittsburg's Petition, 32 Pa. Superior Ct. 210; 4 Thomp. Corps. 5488.

86 As stated in Barbier v. Connolly, 113 U. S. 27, "Neither the amendment (XIV) broad and comprehensive as it is,—nor any other amendment was designed to interfere with the power of the state, sometimes termed its police power, to prescribe regulations to promote the health, peace, morals, education and good order of the people." We are within the provisions of the constitution when we regulate the manufacture and sale of food stuffs, Com. v. McCann, 14 Pa. Superior Ct., 221; the number of hours adult females should labor, Com. v. Beatty, 15 Pa. Superior Ct. 5; and in prohibiting women and children from working in coal mines, Act of May 15, 1893, P. L. 52; in prescribing the qualifications for physicians and undertakers, Com. v. Hanley, 15 Pa. Superior Ct. 271; when musical bands may play in the public streets, Wilkes-Barre v. Garebed, 11 Pa. Superior Ct. 355; when we authorize the killing of dogs following the track of protected game, Com. v. Frederick, 27 Pa. Superior Ct. 228; and in denying the right to aliens to obtain licenses to sell intoxicating liquors: Trageser v. Gray, 73 Md. 250, 9 L. R. A. 780.

The creation of the board of game commissioners of the state, whose duty it is to protect and preserve the game, song and insectivorous birds and mammals (Act of June 25, 1895, P. L. 273), and the department of fisheries having charge of the protection, propagation and distribution of fish (Act of April 2, 1903, P. L. 128) are but legislative conclusions that have been reached after more than a century's experience on this subject, and it was deemed necessary and important to add the provisions of the act of 1909 in order to carry out more effectually the provisions of the earlier enactment.

This legislation is not directed against any particular nationality or special class of aliens, but prohibits "any unnaturalized foreign-born resident" from hunting, capturing or killing any wild bird or animal, and "to that end it shall be unlawful" for such person "to have or be possessed of a shotgun or rifle of any make." The act of May 5, 1864, P. L. 823, prohibiting the carrying of concealed weapons is not obnoxious to the bill of rights, saving the rights of citizens to bear arms in defense of themselves and the state: Wright v. Com. 77 Pa. 470. Nor does the provision in the fourteenth

87 amendment which declares "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States," affect this defendant in any way, as he is not a citizen.

An alien while domiciled with us is entitled to the protection of the laws and owes in return for this protection a temporary and local

allegiance which continues during the period of his residence: 2 Am. & Eng. Enc. of Law (2d ed.), 64. We legislate primarily for our own citizens in granting the special privileges that are independent of our inherent rights. The alien is prohibited from doing many things to which a native-born or a naturalized citizen is entitled. He cannot exercise any political rights whatever, nor be compelled to fill any elective or appointive office; he is not qualified to serve as a juror; or to receive a license to sell liquor, hawk or peddle. A non-resident debtor is not entitled to the benefit of our $300 exemption law. Each state has its own exemption laws for the benefit of its own citizens: Collom's App., 12 W. N. C. 309; Bank v. Lowery, 93 U. S. 72; Deni v. Penna. R. R. Co., 181 Pa. 525. The privilege to hunt game has been limited to our citizens, and, as was said in Presser v. Illinois, 116 U. S. 252: "If the plaintiff in error has any such privilege he must be able to point to the provision of the constitution or statutes of the United States by which it is conferred. For as was said by this court in United states v. Cruikshank, 92 U. S. 542, the government of the United States, although it is within the scope of its powers supreme and beyond the states, can neither grant nor secure to its citizens rights or privileges which are not expressly or by implication placed under its jurisdiction. All that can not be so granted or so secured are left to the exclusive protection of the state.

A state has the same undeniable and unlimited jurisdiction over all persons and things within its territorial limits as any foreign nation, when the jurisdiction is not surrendered or restrained by the constitution of the United States; by virtue of this it is not
88 only the right but the bounden duty of the state to advance the safety, happiness and prosperity of its people, and to provide for its general welfare by any and every act of legislation which it may deem conducive to those ends: New York v. Miln, 36 U. S. 102. The act of 1909 defines two, several and independent offenses: first, the hunting of game by an alien; second, for an alien to either own or be possessed of a shotgun or rifle of any make. The primary subject of the act is the preservation of wild birds, animals and game, and under all our authorities, the privilege of hunting and taking game is limited, under defined restrictions, to our own citizens. Since long-range firearms,—shotguns and rifles—are generally used in killing wild birds and animals, it is clear that the legislature, in prohibiting a foreign-born, unnaturalized resident from hunting game, intended to make the hunting of game by an alien the more difficult by taking away from such persons the means by which game is usually killed. This prohibition against having deadly and long-range firearms does not in any way deprive the alien of property without due process of law, but simply defines and limits his right to use firearms, by restricting such rights to the use of short-range firearms,—revolvers, and pistols, and such other weapons, as may be necessary for defense of his person and property. "Whatever one may claim as a right under the constitution and laws of the United States by virtue of his citizenship, is a privilege of a

citizen of the United States. Whatever the constitution and laws of the United States entitle him to exemption from, he may claim as an exemption in respect to, and such a right or privilege is abridged whenever the state law interferes with any legitimate operation of federal authority which concerns his interest, whether it be an authority actively exerted, or resting only in the express or implied command or assurance of the federal constitution or law. But the United States can neither grant nor secure to its citizens rights or privileges which are not expressly or by reasonable implication placed under its jurisdiction, and all not so placed are left to
89 the exclusive protection of the states." Cooley's Principles, pp. 245-247. See also Bryce's American Commonwealth, 406.

This defendant is not a citizen of the United States nor of this Commonwealth. While he is within our jurisdiction he is entitled to the equal protection of the laws, subject to the limitations of the class of which he is a member. He is one of a very large class of aliens, whose sojourn in the country is but temporary and whose place of abode is capricious and uncertain, who cannot speak our language nor understand our customs or laws, who pay no taxes and share no part of the public burden. Under all our decisions his right to remain among us is subject to the limitations imposed upon all of his class: Trageser v. Gray, 73 Md. 250; 1 Bouvier's Law Dict. title Alien; 1 Am. & Eng. Ency. of Law, 64. "Equal protection of the laws" cannot be said to be denied whenever the law operates alike upon all persons and property similarly situated: Barbier v. Connolly, 113 U. S. 27; Walston v. Nevin, 128 U.S. 578. And in determining what is due process of law we are bound to consider the nature of the property, the necessity for its sacrifice, and the extent to which it has heretofore been regarded as within the police power * * * So far as it is dangerous to the safety or health of the community, due process of law may authorize its summary destruction: Santell v. R. R. Co., 164 U. S. 701; Com. v. McComb 29 Pa. Superior Ct. 411; In re Campbell, 197 Pa. 581.

This act of 1909 is not in contravention of the existing treaty between the kingdom of Italy and the United States. The rule of construction to be followed in such a case has but recently been considered by our Supreme Court in Deni v. Penna. R. R. Co., 181 Pa. 525; and Maiorano v. B. & O. R. R. Co., 216 Pa. 402. By art. II of the treaty between these countries "the citizens of each of the high contracting parties have liberty to travel in the states and territories of the other, to carry on trade, wholesale and retail, to hire and occupy houses and warehouses, to employ agents of their choice and generally to do anything incident to or necessary for trade upon the same term as natives of the country, submitting themselves
90 to the laws then established." And art. III provides: "The citizens of each of the high contracting parties shall receive, in the states and territories of the other, the most constant protection and security for their persons and property, and shall enjoy in this respect the same rights and privileges as are or shall be granted to

the natives on their submitting themselves to the conditions imposed upon the natives." As held in the last-cited case, "In construing a treaty the general rule obtains that the court is to be guided by the intention of the parties, and if the words clearly express the meaning and intention no other means of interpretation can be employed." Is it a reasonable construction to hold that it was intended to clothe unnaturalized foreign-born residents with the same rights, immunities and advantages as are conferred solely as a privilege on citizens? The whole trend of our decisions is against such an interpretation. The terms of the treaty provide for the protection and security of their persons and property, and in this respect,—to such protection and security,—the enjoyment of the same rights and privileges as are or shall be granted to the natives on their submitting themselves to the conditions imposed on the natives.

An unnaturalized foreign-born resident cannot comply with the conditions imposed on a native-born or naturalized resident. Article XIV of the federal constitution defines this condition: "All persons born or naturalized in the United States and subject to the jurisdiction thereof are citizens of the United States, and of the states wherein they reside." It would be a perversion of language to hold that the phrase,—the same rights and privileges as are or shall be granted to the natives,—was intended to or could embrace all the regulations affecting our franchise rights; the administration and execution of our laws; the special rights granted as privileges by our government to particular classes of our citizens. Such a construction would render nugatory the qualification for president of the United States as provided by art. II, sec. 1, par. 5, of our federal constitution and other limitations that are made equally explicit in our fundamental law.

The assignments of error are overruled and the judgment is affirmed.

In the Supreme Court of Pennsylvania, Western District.

No. 20, October Term, 1911.

COMMONWEALTH OF PENNSYLVANIA

v.

JOSEPH PATSONE.

Appeal from Superior Court Affirming Judgment of Q. S. Allegheny.

Opinion of Supreme Court.

Filed March 20, 1911.

Per Curiam:

The judgment of the superior court is affirmed on the opinion of Judge Orlady.

93 A writ of error is allowed upon the foregoing petition, bond to be given by the plaintiff in error and proper sureties to the amount of $500.00. Citation allowed.

HORACE H. LURTON,
Associate Justice Supreme Court.

May 6, 1911.

94 [Endorsed:] In the Supreme Court of Pennsylvania. No. 20, October Term, 1911. Commonwealth of Pennsylvania vs. Joseph Patsone. Petition for Writ of Error. Filed May 16, 1911. Supreme Court, W. D. Marcel A. Viti.

95 In the Supreme Court of the United States. Commonwealth of Pennsylvania vs. Joseph Patsone. Filed May 16, 1911, Supreme Court of Pennsylvania, W. D. Copy of bond on appeal.

96 Know all men by these presents, That we, Joseph Patsone a subject of the Kingdom of Italy, now residing at Pittsburgh in the county of Allegheny, State of Pennsylvania, as principal, and United States Fidelity & Guaranty Co. of Baltimore Maryland as sureties are held and firmly bound unto the Commonwealth of Pennsylvania in the full and just sum of Five hundred, ($500.) dollars to be paid to the said Commonwealth of Pennsylvania its certain attorney, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors and administrators, successors and assigns, jointly and severally, by these presents.

Sealed with our seals and dated this 1st day of May in the year of our Lord one thousand nine hundred and eleven.

Whereas, lately at a Term of the Supreme Court of Pennsylvania as of October Term 1911 No. 20, in a suit depending in said Court between the Commonwealth of Pennsylvania and the above bounden principal the conviction (summary) of the above bounden principal before U. G. McMurray, a Justice of the Peace of Allegheny County, Pennsylvania, was affirmed and the judgment of the Court of Quarter Sessions of said county and of the Superior Court of Pennsylvania rendered against the said Joseph Patsone on appeal was affirmed and the said Joseph Patsone having obtained a writ of error and filed a copy thereof in the Clerk's office of the said Court to reverse the judgment in the aforesaid suit, and a citation directed to the said
97 Commonwealth of Pennsylvania citing and admonishing it to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date thereof.

Now the condition of the above obligation is such That if the said Joseph Patsone shall prosecute his writ of error to effect, and answer

all damages and costs if he fail to make his plea good, then the above obligation to be void; else to remain in full force and virtue.

Sealed and delivered in presence of —.

(Signed) JOSEPH PATSONE, [SEAL.]
By —— ——,
Royal Consul of Italy,
Official Representative. [SEAL.]

[Seal of Consulate.]

UNITED STATES FIDELITY & GUARANTY CO.,
By HENRY STROUSE, (?)
Resident Vice President.

Attest:

FRANK M. FLYNN, (?)
Resident Secretary.

[Seal of Guaranty Co.]

Approved by
HORACE H. LURTON,
Associate Justice of the Supreme Court of the United States.

May 6, 1911.

UNITED STATES OF AMERICA, *ss:*

[Seal of the Supreme Court of the United States.]

The President of the United States of America to the Honorable the Judges of the Supreme Court of the State of Pennsylvania, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Supreme Court before you, or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between The Commonwealth of Pennsylvania, plaintiff, and Joseph Patsone, defendant, wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under, said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity; or wherein was drawn in question the construction of a clause of the Constitution, or of a treaty, or statute of, or commission held under the United States, and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission, a manifest error hath happened to the great damage of the said Joseph Patsone as by his complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be

therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within thirty days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable Edward D. White, Chief Justice of the United States, the 6th day of May, in the year of our Lord one thousand nine hundred and eleven.

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

Allowed by
HORACE H. LURTON,
Associate Justice of the Supreme Court of the United States.

[Endorsed:] Filed May 16, 1911, Supreme Court, W. D.

100 COMMONWEALTH OF PENNSYLVANIA,
County of Allegheny, ss:

I, George Pearson, Prothonotary of the Supreme Court of Pennsylvania, for the Western District thereof,

Do hereby certify that the bond, a copy of which appears within the transcript of record, and copy of writ of error have been lodged in this court in the suit pending therein wherein the Commonwealth of Pennsylvania is plaintiff and Joseph Patsone is appellant as of No. 20 October Term 1911 of said court.

GEORGE PEARSON,
Prothonotary.

101 UNITED STATES OF AMERICA, ss:

To the Commonwealth of Pennsylvania, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within thirty days from the date hereof, pursuant to a writ of error, filed in the Clerk's Office of the Supreme Court of the State of Pennsylvania wherein Joseph Patsone is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Horace H. Lurton, Associate Justice of the Supreme Court of the United States, this 6th day of May, in the year of our Lord one thousand nine hundred and eleven.

HORACE H. LURTON,
Associate Justice of the Supreme Court of the United States.

102 Service of the within citation is hereby accepted upon behalf of the Commonwealth of Pennsylvania, def't in error.

W. H. LEMON,
Att'y for the Commonwealth of Pennsylvania.
W. W. BLASELEY,
Dist. Att'y Alt'y Co.
JNO. C. BELL,
Att'y General for the Commonwealth of Pennsylvania.

103 *Return to Writ.*

UNITED STATES OF AMERICA,
Supreme Court of Pennsylvania, ss:

In obedience to the commands of the within writ, I herewith transmit to the Supreme Court of the United States a duly certified transcript of the complete record and proceedings in the within entitled case, with all things concerning the same.

In witness whereof, I hereunto subscribe my name, and affix the seal of said Supreme Court, in the City of Pittsburgh, this 26th day of May, 1911.

[Seal of the Supreme Court of Pennsylvania, Western District.]

GEORGE PEARSON, *Prothonotary.*

Endorsed on cover: File No. 22,721. Pennsylvania Supreme Court. Term No. 314. Joseph Patsone, plaintiff in error, vs. The Commonwealth of Pennsylvania. Filed June 6th, 1911. File No. 22,721.

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IN THE

Supreme Court of the United States.

October Term, 1912. No. 314.

JOSEPH PATSONE,

Plaintiff in Error,

against

THE COMMONWEALTH OF PENNSYLVANIA.

BRIEF FOR PLAINTIFF IN ERROR.

STATEMENT OF THE CASE.

The defendant was arrested and taken before a justice of the peace of Allegheny County, Pennsylvania, charged with having in his possession a shotgun in violation of the Act of the Assembly of Pennsylvania of May 8, 1909, P. L. 466, and a shotgun, the property of the defendant, was taken possession of by the officer making the arrest. The justice of the peace summarily convicted the defendant of the charge and sentenced him to pay a fine of $25 or suffer imprisonment in the county jail for a period of twenty-five days.

The defendant upon allowance of the Court of Quarter Sessions of Allegheny County, Pennsylvania, appealed from the justice of the peace, alleging that the Act of Assembly was unconstitutional. The said Court of Quarter Sessions affirmed the conviction and adjudged the defendant guilty.

The defendant appealed to the Superior Court of Pennsylvania and that court affirmed the judgment of the said Court of Quarter Sessions.

The defendant petitioned the Supreme Court of Pennsylvania to be allowed to appeal from the judgment of the said Superior Court of Pennsylvania and leave to appeal was granted. The Supreme Court of Pennsylvania affirmed the judgment of the said Superior Court of Pennsylvania.

The defendant petitioned the Supreme Court of the United States for a writ of error to the Supreme Court of Pennsylvania in order that the judgment of the said court might be reversed and annulled; and the writ of error was allowed.

ASSIGNMENTS OF ERROR.

I. The Supreme Court of Pennsylvania erred in making the following order, viz.: "The judgment of the Superior Court is affirmed on the opinion of Judge Orlady."

II. The Supreme Court of Pennsylvania erred in affirming the judgment of the Superior Court of Pennsylvania affirming the judgment of the Court of Quarter Sessions of Allegheny County, viz.: "After hearing the evidence and arguments of several, the defendant is adjudged guilty."

III. The Supreme Court of Pennsylvania erred in not deciding that the Act of May 8, 1909, P. L. 466, entitled "An Act to give additional protection to wild birds and animals and game, within the Commonwealth of Pennsylvania; prohibiting the hunting for, or capture or killing of, such wild birds or animals or game by unnaturalized foreign-born residents; forbidding the ownership or possession of shotgun or rifle by any unnaturalized foreign-born resident, within the Commonwealth; and prescribing penalties for violation of its provisions" is unconstitutional.

IV. The Supreme Court of Pennsylvania erred in not holding the Act of May 8, 1909, P. L. 466, unconstitutional and void because it violates the Fourteenth Amendment to the Constitution of the U ited States.

V. The Supreme Court of Pennsylvania erred in not holding the Act of May 8, 1909, P. L. 466, unconstitutional and void because it violates the provision of the Fourteenth Amendment to the Constitution of the United States, which forbids a State to deprive any person of life, liberty or property without due process of law.

VI. The Supreme Court of Pennsylvania erred in not holding the Act of May 8, 1909, P. L. 466, unconstitutional and void because it violates the provisions of the Fourteenth Amendment to the Constitution of the United States, which forbids a State to deprive any person of the equal protection of the laws.

VII. The Supreme Court of Pennsylvania erred in not holding the Act of May 8, 1909, P. L. 466, unconstitutional and void because it is in contravention of the existing Treaty of Commerce and Navigation between the United States and the Kingdom of Italy.

VIII. The Supreme Court of Pennsylvania erred in not holding the Act of May 8, 1909, P. L. 466, unconstitutional and void because it is in contravention or Article II of the existing Treaty of Commerce and Navigation between the United States and the Kingdom of Italy.

IX. The Supreme Court of Pennsylvania erred in not holding the Act of May 8, 1909, P. L. 466, unconstitutional and void because it is in contravention of Article III of the existing Treaty of Commerce and Navigation between the United States and the Kingdom of Italy.

BRIEF OF THE ARGUMENT.

(1) The Pennsylvania Act while providing for the protection of game, prohibits the ownership or possession of shotguns or rifles by aliens for any purpose and provides for their confiscation.

A State by a proper exercise of the police power may prevent aliens from hunting game, but for such a purpose it cannot deprive them as a class of lawful weapons used for the protection of person and property and confiscate such instruments entirely irrespective of their having been put to any illegal use.

No authorities have been found holding that instruments innocent in themselves, may be confiscated while being put to a lawful use.

The Pennsylvania Act deprives aliens as a class of the equal protection of law, as it provides for the confiscation of certain kinds of property only when owned by them; and thus singles out a class for discriminating and hostile legislation.

It further discriminates against resident aliens by depriving them of the possession of property which is allowed to aliens who have been in the State of Pennsylvania for periods of less than ten days.

The inequalities of the Act cannot be justified on the ground of proper classification.

(2) The Act violates the treaty between the United States and Italy.

Italian citizens are prevented from carrying on trade upon the same terms as natives, as they are not allowed to be possessed of shotguns or rifles for any purpose.

They are not allowed to protect their persons and property in the same manner as natives, as the means of defense of person and property by shotgun and rifle is impossible on account of confiscation; and for the same reason their property in shotguns and rifles is not protected equally.

The treaty with Switzerland, which is available to Italian subects under the Most Favored Nation Clause of the Italian Treaty, is violated through the placing of more burdensome conditions upon Italian subjects than are imposed upon natives.

The treaty is the supreme law of the land and cannot be restricted or interfered with in any way by the exercise of any State power.

The entire treaty making power of the United States is granted to the National Government and it is unrestricted in any way.

Treaties superseding State laws of inheritance of realty and those appertaining to the administration of estates of aliens have been sustained.

ARGUMENT.

Joseph Patsone, the plaintiff in error, was convicted of having in his possession a shotgun in violation of the provisions of the Act of the Assembly of Pennsylvania of May 8, 1909, and it is proposed to discuss the constitutionality of that act with reference to the Fourteenth Amendment to the Constitution of the United States, and the existing treaty of Commerce and Navigation between the United States and Italy, of which country the plaintiff in error is a subject.

POINT I.

THE ACT VIOLATES THE PROVISIONS OF THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

(*a*) The act deprives persons of liberty and property without due process of law.

The Fourteenth Amendment to the Constitution of the United States provides:

> "Nor shall any State deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

The before referred to Act of May 8, 1909, is as follows:

> "AN ACT
>
> To give additional protection to wild birds and animals and game, within the Commonwealth of Pennsylvania; prohibiting the hunting for, or capture or killing of, such wild birds or animals or game by unnaturalized foreign-born residents; forbidding the ownership or possession of shotgun or rifle by any unnaturalized foreign-born resident, within the Commonwealth; and prescribing penalties for violation of its provision.

Section 1. Be it enacted, &c., That from and after the passage of this act, it shall be unlawful for any unnaturalized foreign-born resident to hunt for or capture or kill, in this Commonwealth, any wild bird or animal, either game or otherwise, of any description, excepting in defense of person or property; and to that end it shall be unlawful for any unnaturalized foreign-born resident, within this Commonwealth, to either own or be possessed of a shotgun or rifle of any make. Each and every person violating any provision of this section shall, upon conviction thereof, be sentenced to pay a penalty of twenty-five dollars for each offense, or undergo imprisonment in the common jail of the county for the period of one day for each dollar of penalty imposed: Provided, That in addition to the before-named penalty, all guns of the before-mentioned kinds found in possession or under control of an unnaturalized foreign-born resident shall, upon conviction of such person, or upon his signing a declaration of guilt as prescribed by this act, be declared forfeited to the Commonwealth of Pennsylvania, and shall be sold by the Board of Game Commissioners as hereinafter directed.

Section 2. For the purposes of this act, any unnaturalized foreign-born person who shall reside or live within the boundaries of the Commonwealth of Pennsylvania for ten consecutive days shall be considered a resident, and shall be liable to the penalties imposed for violation of the provisions of this act.

Section 3. That the possession of a shotgun or rifle at any place outside of building, within this Commonwealth, by an unnaturalized foreign-born resident, shall be conclusive proof of a violation of the provisions of section one of this act, and shall render any person convicted thereof liable to the penalty as fixed by said section.

Section 4. That the presence of a shotgun or rifle in a room or house, or building or tent, or camp of any description, within this Commonwealth, occupied or controlled by an unnatural-

ined foreign-born resident, shall be prima facie evidence that such gun is owned or controlled by the person occupying or controlling the property in which such gun is found, and shall render such person liable to the penalty imposed by section one of this act.

Section 5. That notice of the seizure of all guns, made for violation of any provision of section one of this act shall be sent to the Board of Game Commissioners, at Harrisburg, by the officer making such seizure, immediately after the final verdict in any prosecution brought for violation of said provisions, or upon the signing of the acknowledgment of guilt, as hereinafter provided; and the gun so seized shall be sold, at the discretion of the said Board of Game Commissioners, who shall apply the money thus realized, first, to the payment of costs arising from such prosecution and seizure, and the remainder, if any, shall be paid to the State Treasurer, for the use of the Commonwealth.

Section 6. That all duly appointed and sworn officers of the Board of Game Commissioners of this Commonwealth, and all constables, police officers, members of the State constabulary, forestry wardens, and all peace officers of the Commonwealth, shall have the right, and it is hereby made their duty, to arrest, without warrant, any person whom they have good reasons to suspect as belonging to the class of unnaturalized foreign-born residents, when they find such person with guns of the before-mentioned kind in possession, within the Commonwealth of Pennsylvania. Such arrests may also be made upon Sunday, in which case the person or persons so arrested, for safe-keeping may be committed to the jail or lock-up for that day; but shall be taken before the proper magistrate and proceeded against on a week day following the arrest; and any or either of such officers shall have the right and power, where they suspect the concealment by an unnaturalized foreign-born resident of guns of the before-mentioned kind, to apply to any court having jurisdic-

tion of the offense, within the Commonwealth, who, upon receipt of proof made by affidavit of the probable cause for believing in such concealment, shall issue a search warrant and cause a search to be made in any place; and to that end, the said officer shall have power, after demand and refusal, to cause any building, room, inclosure, or car to be broken open and entered, and any closet, chest, locker, box, trunk, crate, basket-box, or package, or other receptacle, to be open and contents examined by said officer.

Section 7. Each and every magistrate, alderman, and justice of the peace of this Commonwealth shall have the power of summary conviction pertaining to the violation of any of the provisions of this act; and all actions for violation of any of the provisions hereinbefore mentioned, excepting where the defendant is taken in the act or in a pursuit immediately following the act, shall be commenced by affidavit made within one year of the time of such violation. Each and every magistrate, alderman, and justice of the peace, on complaint made before him, on affidavit of any person, of a violation of the provisions of this act by any person, is herewith authorized and required to issue his warrant, under his hand and official seal, directed to any constable, police officer, game protector, or any other officer of the State known as a police officer and authorized to serve warrants, and cause such person to be brought before such magistrate, alderman, or justice of the peace, who shall hear the evidence and determine the guilt or innocence of the party charged. If the accused be convicted of such offense, he shall be sentenced to pay the full penalty prescribed by the section violated, and to pay all costs of prosecution. All penalties collected in cases where the prosecutor is a paid officer of the Board of Game Commissioners shall be immediately surrendered by the court receiving the same to such prosecutor, who in turn shall, as soon as may be, forward or deliver such amount in full to the secretary of the board, who shall at once deposit the

same to the use of the Commonwealth. Where any other than a paid officer of the Board of Game Commissioners is the prosecutor, one-half of any penalty thus collected shall belong to said prosecutor, and be paid to him; and the remaining one-half shall be forthwith forwarded to the secretary of the Game Commission, at Harrisburg, together with a statement of the cause for which said money shall have been collected. The cost of which statement is hereby fixed as fifty cents, and made a part of the costs of prosecution. It shall be the duty of the Board of Game Commissioners to keep a record of the cases for which said money was collected, and to deliver the fund thus arising, at least once a month, to the State Treasurer, for the use of the Commonwealth. Any defendant refusing to pay such penalty, with the costs of prosecution, shall be committed to the common jail of the county, for a period of one day for each dollar of penalty imposed, unless he shall enter a good and sufficient recognizance, with one or more sureties, to pay such penalty within ten days, or to answer such complaint, upon the charge of misdemeanor, before the court of quarter sessions of the peace of the county in which the offense was committed; which said court, upon the conviction of the defendant of such offense, and on his failure to pay the penalty imposed, together with the costs of prosecution, shall commit such defendant to the common jail of the county for a period of one day for each dollar of penalty imposed: Provided, That any person charged with violation of any of the provisions of this act may, at his discretion, sign an acknowledgment of the offense committed, and pay any duly sworn game protector the penalty in full, as fixed by the section violated, with costs to that date; and the printed receipt therefor, which shall in every instance bear the seal of the Board of Game Commissioners and the signature of its secretary, shall be evidence of full satisfaction for the offense committed: Provided also, That all guns seized, in cases in which the before-mentioned receipt is

given, shall be sold under the provisions of section five, and the moneys realized therefrom be applied as therein directed.

Section 8. All acts or parts of acts inconsistent with the provisions of this act are hereby repealed."

Mr. Justice Field, in discussing the provisions of the Fourteenth Amendment in Barbier vs. Connolly, 113 U. S. 27 (1885), said:

> "The Fourteenth Amendment, in declaring that no State 'shall deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws,' undoubtedly intended not only that there should be no arbitrary deprivation of life or liberty, or arbitrary spoliation of property, but that equal protection and security should be given to all under like circumstances in the enjoyment of their personal and civil rights; that all persons should be equally entitled to pursue their happiness and acquire and enjoy property; that they should have like access to the courts of the country for the protection of their persons and property, the prevention and redress of wrongs, and the enforcement of contracts; that no impediment should be interposed to the pursuits of any one except as applied to the same pursuits by others under like circumstances; that no greater burdens should be laid upon one than are laid upon others in the same calling and condition, and that in the administration of criminal justice no different or higher punishment should be imposed upon one than such as is prescribed to all for like offenses."

The first subject of the act is the protection of game through prohibiting aliens from hunting. The second subject is a prohibition against the ownership or possession of shotguns and rifles by aliens. It is

freely admitted that the preservation of game and fish falls within the proper limits of the police power and that their capture is a privilege that may be limited by legislation to the citizens of any State, provided the power is exercised in a reasonable manner and by proper means.

In Lawton vs. Steele, 152 U. S. 133 (1894), Mr. Justice Brown said:

> "The extent and limits of what is known as the police power have been a fruitful subject of discussion in the appellate courts of nearly every State in the Union. It is universally conceded to include everything essential to the public safety, health and morals, and to justify the destruction or abatement, by summary proceedings, of whatever may be regarded as a public nuisance. . . . To justify the State in thus interposing its authority in behalf of the public, it must appear first, that the interests of the public generally, as distinguished from those of a particular class, require such interference; and, second, that the means are reasonably necessary for the accomplishment of the purpose, and not unduly oppressive upon individuals."

In Mugler vs. Kansas, 123 U. S. 623, 661 (1887), Mr. Justice Harlan said:

> "The courts are not bound by mere forms, nor are they to be misled by mere pretences. They are at liberty—indeed they are under a solemn duty—to look at the substance of things, whenever they enter upon the inquiry whether the legislature has transcended the limits of its authority. If, therefore, a statute purporting to have been enacted to protect the public health, the public morals, or the public safety, has no real or substantial relation to those objects, or is a palpable invasion of rights secured by the fundamental law, it is the duty of the courts to so adjudge, and thereby give effect to the Constitution."

The purpose of the act, as shown by the title, is the protection of game, and in furtherance of this subject it forbids alien residents of the State to hunt for, capture or kill any wild bird or animal, either game or otherwise, excepting in defense of person or property. So far the legislature could legally go under its police power, as game and fish have been held to be the property of the State in trust for its citizens. But for the stated purpose of preventing aliens from hunting game, the act goes further and forbids alien residents to own or be possessed of a shotgun or rifle under any circumstances or conditions for any purpose whatsoever. The plaintiff in error was convicted of this latter offence and his shotgun confiscated. Can a State Legislature for such a purpose deprive a large part of the population of the State of the right to possess such weapons, necessary for the protection of their persons and property and confiscate such firearms entirely irrespective of their having been put to any illegal use?

At the moment the act in question went into effect every alien who had resided in Pennsylvania for a period of ten days, who was the owner or in possession of a shotgun or rifle became guilty of an offense under the act and subject to its penalties. Thus property to a vast sum of money in the aggregate became subject to confiscation, upon the initiative of any informer, though its possession had previously been lawful and continued lawful for all the rest of the population of the State.

While the legislature may have authority to declare unlawful property which is innocent in itself, as is said in Lawton vs. Steele, supra, yet such power must not be exercised in such a way as to infringe fundamental rights to a greater extent than is absolutely necessary for the accomplishment of the legal

purpose in view. And in order to justify such an extreme measure as confiscation the necessity must be apparent and the means such as have been recognized in similar cases by the courts.

The two principal cases cited in support of the constitutionality of the act under discussion are Lawton vs. Steele, supra, and Geer vs. Connecticut, 161 U. S. 519 (1896), but neither of these decisions is conclusive of the controlling questions of law raised by this appeal.

In Lawton vs. Steele the plaintiff had brought suit against a game warden for destroying his nets under a law of New York, which authorized such destruction, where the nets were found on the waters, shores or islands of the State. Some of the nets destroyed were in use contrary to law at the time of seizure, others were upon the shore, showing evidence of recent use. Here, therefore, there was no question but that the articles destroyed had been put to illegal use.

In Geer vs. Connecticut the defendant was convicted of having in his possession certain game birds which were killed within the State of New York after the beginning of the close season, with intent to transport them without the State, contrary to law. Here again the offense consists of the illegal use to which the birds were to be put. The actual points decided in these two cases have been very carefully summarized by the Court of Appeals of New York in the case of People vs. Buffalo Fish Company, 164 N. Y. 93 (1900), where O'Brien, J., said:

> "Lawton vs. Steele (152 U. S. 133). That case decided three propositions, none of which have any relation to this case. (1) That the State had the power to regulate the manner of taking fish from waters within its jurisdiction. (2) That it had power to forbid fishing in such waters with nets.

(3) That the nets destroyed in that case, being of comparatively small value, the State had power to declare them a nuisance and summarily abate them.

"Geer vs. Connecticut (161 U. S. 519). That case decides the following points: (1) That a State statute which forbids the killing of game for the purpose of conveying the same beyond the limits of the State, or having it in possession with that intent, is valid. (2) That wild game within the State belongs to the whole people in common, and that legislation to prevent its extinction by conveying it out of the State was not in conflict with the Constitution. (3) That the individual who caught or killed it within the State acquired not an absolute, but a qualified property in it, since the use or enjoyment was limited to the boundaries of the State. (4) That since the use or enjoyment was limited to the people of the State it was not the subject of foreign or interstate commerce, though it was the subject of internal commerce. (5) Not being the subject of foreign or interstate commerce, but merely of internal commerce, the statute was not in conflict with the commerce clause of the Federal Constitution."

In the case of People vs. West, 106 N. Y. 293, 297, in which the defendant was convicted under an act making it an offense to sell or bring diluted milk to a creamery, the constitutionality of the act being in question, Andrews, J., said:

"The act in question invades neither life, liberty nor property. It destroys no existing property. . . . It deprives no one of obtaining an honest livelihood . . . and it curtails no one in the exercise of any right, excepting the right to do an act, which in ordinary circumstances could only be done with a fraudulent purpose."

This statute did not attempt to penalize the mere possession of skim milk, but the offense consisted in

putting the milk to an illegal use by selling it to a creamery, whereby the health of the community would be affected.

In Osborn vs. Charlevoix Circuit Judge, 114 Mich. 655 (1897), the decision involved the constitutionality of an act, which provided for the seizure of nets found in use in violation of law. The court said:

> "It is clear that this act permits the seizure of nets and apparatus, but only when the same is found in actual unlawful use. . . . There is no doubt of the power of the Federal or State Governments to declare forfeited and to destroy or sell articles found in use by the owner for the perpetration of crime. There is probably no civilized country or State which does not enforce such laws."

In the case of Mon Luck vs. Sears, 29 Oregon, 421 (1896), the defendant had been arrested for having opium in his possession contrary to an act of the State of Oregon, restricting the possession thereof to druggists, and took out a writ of habeas corpus. Bean, Ch. J., said:

> "The act does not forbid the possession or prohibit the sale of opium, but allows both under such regulations and conditions as will, it is believed, tend to prevent its harmful and improper use. No right secured by the fundamental law is interfered with or impaired by this legislation, because the possession and use of the drug are not restrained thereby, so as to destroy its value as a remedial agent—its only recognized legitimate use. Its object and purpose is to so regulate the possession, sale and disposition of a dangerous yet useful drug as to prevent the weak and unwary from using it to their own physical and mental ruin, and to the serious injury of the general public; and in our opinion, violates no constitutional right."

And after discussing the right of the legislature to restrict the possession of intoxicating liquors, the court went on to say:

> "But the use of opium for any purpose other than as permitted in this act has no place in the common experience or habits of the people of this country, but is admitted by all to be an insidious and demoralizing vice, injurious alike to the health, morals and welfare of the public; and therefore its possession, unless in the manner provided by the legislature for the purposes stated, cannot be presumed to be of any value to its owner except on the hypothesis that he intends to make a use of it injurious to himself and the general public, and hence it is within the legitimate exercise of the police power of the State to regulate its sale, and confine its possession to certain designated persons, as a means of public safety."

The court based its decision expressly upon the ground that, owing to the very nature of the drug, its possession could not be justified as necessary except for medical purposes, as provided for in the act, which was for that reason a proper exercise of the police power.

In the case of State vs. Lewis, 134 Indiana, 250 (1892), the defendant had been convicted under an act making it a misdemeanor to have in his possession a gill net or seine except for use in a certain river and in private ponds. Olds, J., said:

> "This statute prohibits the use of gill nets and seines, except certain kinds or in certain waters. They are not a species of property adapted to any other use. The fact that they are made of material harmless in itself and valuable for other uses, does not change the right of the State to prohibit the use of or the possession of such material when woven into nets used solely for the purpose of catching fish at times and in waters prohibited by statute. The gill net and

the seine are made and used exclusively for catching fish, trapping them and catching them in large quantities. This method of catching fish the State has a right to prohibit, and if it has the right to so prohibit the catching, why has it not the right also to prohibit persons having an article of property in their possession used solely for such unlawful purposes?"

It will be noted that the right of the legislature to pass such a statute is expressly based upon the ground that the nets were a species of property not adapted to any but an unlawful use and the necessary inference is that if they had been useful for other and lawful purposes, the legislature could not have forbidden their possession and provided for their confiscation.

In McConnell vs. McKillip, 71 Neb. 712, 717 (1904), Am. & Eng. Ann. Cases, Vol. 8, page 878, the statute under consideration provided for the forfeiture of all guns, ammunition, dogs, etc., in actual use for hunting without proper license, and provided for their summary seizure and sale. The court emphasized the distinction between property which was of no use except for an unlawful purpose and that which was capable of lawful use.

> "No case has been brought to our attention in which a court has construed a statute which provides for the seizure, forfeiture to the State and sale of property of the kind involved in this case, which has been used in violation of the game laws. As a rule, the statutes have declared nets and like devices, which can only be used in violation of law, to be public nuisances, and provided for their abatement by their destruction by public officers.
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> . . . . . .
>
> "There is a clear and marked distinction between that species of property which can only be used for an illegal purpose, and which therefore may be declared a nuisance and summarily abated,

and that which is innocent in its ordinary and proper use, and which only becomes illegal when used for an unlawful purpose. We know of no principle of law which justifies the seizure of property, innocent in itself, its forfeiture and the transfer of the right of property in the same from one person to another as a punishment for crime, without the right of a hearing upon the guilt or innocence of the person charged, before the forfeiture takes effect. If the property seized by a game keeper or warden were a public nuisance, such as provided for in section one, he had the right under the duties of his office at common law to abate the same without judicial process or proceeding, and the great weight of authority is to the effect that such common law rights have not been abrogated or set aside by the provisions of the Constitution; but if the property is of such a nature that, though innocent in itself and susceptible of a beneficial use, it has been perverted to an unlawful use, and is subject to forfeiture to the State as a penalty, no person has a right to deprive the owner of his property, summarily, without affording opportunity for a hearing and without due process of law. . . ."

These cases therefore hold that a State may forbid absolutely the possession of game within its borders because the individual only acquires therein a qualified right of property; that it may also forbid the possession of articles, which are not adapted to any but an unlawful use and may confiscate articles actually put to an illegal use or found under circumstances, from which it must necessarily be inferred that such articles had been or were about to be used for an illegal purpose.

Under the terms of the present act the mere possession of property, innocent in itself, and having lawful uses, is made an offense apart from its being used unlawfully and its forfeiture is fixed as part of the pen-

alty. If the state has not the right to confiscate such property under such circumstances, the fact that the owner of the property is entitled to a hearing at which he can offer no defense is surely not a compliance with that portion of the Fourteenth Amendment, which provides that no person shall be deprived of property without due process of law.

None of the cases, however, holds that the possession of property harmless in itself and which is necessary for lawful purposes may be prohibited and the property itself confiscated merely because it is also capable of being put to an illegal use.

It appears, therefore, from these decisions, that in order to prevent the illegal taking of game or fish, a Legislature, under the police power, may provide for the summary destruction, as a public nuisance, of all implements which are fitted for no other purpose than that of illegal hunting or fishing, and may also provide for the forfeiture, after proper hearing, of all implements which, though susceptible of beneficial use, may have been perverted to an unlawful use. This, however, is the limit of the power of the legislature, and it cannot provide that implements which are susceptible of beneficial use and which have not been perverted to an unlawful use, be summarily abated or declared forfeited after a hearing, as part of a penalty for the offense of having them in possession.

Shotguns and rifles are articles of property not harmful in themselves, necessary for legitimate uses, and there is no manifest necessity to forbid their possession in order to prevent aliens from hunting game. The authorities fail to establish that the provisions of the act forbidding the possession of long-range firearms, are such as have heretofore been regarded as reasonable regulations within the police power.

(*b*) The act deprives persons of the equal protection of the law.

It may be assumed, for the purposes of argument, that the State of Pennsylvania has a right to forbid the use of, and to confiscate, all shotguns and rifles within its territory, and thereby deprive its inhabitants of much valuable property without compensation, as well as depriving them of the protection thereby afforded. But it cannot deprive any person or class of persons of the equal protection of its laws.

As is stated by Mr. Chief Justice Fuller, in Duncan vs. Missouri, 152 U. S. 377, 382 (1894):

> "Due process of law and equal protection of the laws are secured if the laws operate on all alike and do not subject the individual to an arbitrary exercise of the powers of government."

In Missouri vs. Lewis, 101 U. S. 22, 31 (1879), Mr. Justice Bradley stated:

> ". . . It means that no person or class of persons shall be denied the same protection of the laws which is enjoyed by other persons or other classes in the same place and under like circumstances."

The provisions of the Fourteenth Amendment guaranteeing equal protection of the law are clearly violated by the act in question. It forbids the possession of shotguns and rifles by resident aliens alone, thus depriving them of most efficient and essential instruments for the protection of their persons and property. It further provides for the confiscation of valuable, innocent property when owned by aliens, notwithstanding that it has never been put to any illegal use and which all other inhabitants of the State are permitted to use for all lawful purposes. It singles out a class for discriminating and hostile legislation.

Such methods were not thought necessary to pre-

vent the use of forbidden apparatus under the general game laws of Pennsylvania, and it hardly seems conceivable that there are no means by which the legitimate purposes of the act may be accomplished other than by the discriminatory ones. For example, it has not been deemed necessary to provide for the confiscation of automatic shotguns and swivel guns, whose use is forbidden by the game laws of Pennsylvania, and to make their ownership a misdemeanor and their mere possession conclusive proof of guilt in order to enforce the objects of these statutes.

There is a further discrimination against resident aliens as distinguished from non-resident aliens, as the latter are apparently allowed to possess shotguns and rifles, and furthermore, to use them within the State of Pennsylvania for the purpose of hunting game for periods of ten days, subject only to the general game laws of the State.

In Plessy vs. Ferguson, 163 U. S. 530, 537 (1896), Mr. Justice Brown said:

> ". . . every exercise of the police power must be reasonable and extend only to such laws as are enacted in good faith for the public good and not for the annoyance or oppression of a particular class."

In the case of State vs. Montgomery, 94 Me. 192 (1900), a State law prohibited the peddling of certain goods without a license, and permitted the granting of licenses to citizens of the United States but to no other person. This statute in its discrimination was held obnoxious to the Fourteenth Amendment to the Constitution of the United States. Savage, J., said:

> "In the light of these interpretations of the fourteenth amendment, we are compelled to conclude that a statute which forbids peddling except under a license, and which provides that citizens of the United States may be licensed, and

that aliens shall not be, is a denial of the 'equal protection of the laws.' It is an unconstitutional discrimination against aliens. It does more than impose unequal burdens and charges upon the alien. It absolutely denies him the privilege of an occupation open to citizens, which is more than a discrimination in burdens. It does not permit the alien within our jurisdiction to pursue a business occupation and to acquire and enjoy property on equal terms with the citizen. Yick Wo vs. Hopkins, supra.

"Nor can this discrimination be sustained as a constitutional exercise of the police power of the state. It must be noticed that the discrimination is not against a class, as criminals, as paupers, as intemperate, as disqualified by character or habits, or as harmful to society; but against a class solely as aliens. Such a discrimination is forbidden. Gulf, Colorado & Santa Fe Ry. vs. Ellis, supra.

"And, although, in this case the discrimination was not injurious to the respondent, because he was not an alien and was not thereby prohibited from obtaining a license, still, for reasons already suggested, we think the Hawkers' and Pedlers' Act must be regarded as invalid in toto. We cannot separate the constitutional part from the unconstitutional. The distinction between citizens and aliens is fundamental in the scheme for licensing."

In Templar vs. Barbers' Board of Examiners, 131 Mich. 254, (1902), it was held that the provisions of an act requiring an applicant for a barbers' license to be a citizen of the United States were invalid under the Fourteenth Amendment by denying equal protection of the laws.

The above inequalities of the said act cannot be justified on the ground of proper classification, which are defined in the case of Railway Company vs. Ellis, 165 U. S. 150, 155 (1897), by Mr. Justice Brewer as follows:

"But it is said that it is not within the scope of the Fourteenth Amendment to withhold from States the power of classification, and that if the law deals alike with all of a certain class it is not obnoxious to the charge of a denial of equal protection. While, as a general proposition, this is undeniably true, yet it is equally true that such classification cannot be made arbitrarily. The State cannot say that all white men shall be subjected to the payment of the attorney's fees of parties successfully suing them, and all black men not. It may not say that all men beyond a certain age shall be alone thus subjected, or all men possessed of a certain wealth. These are distinctions which do not furnish any proper basis for the attempted classification. That must always rest upon some difference which bears a reasonable and just relation to the act in respect to which the classification is proposed, and can never be made arbitrarily and without any such basis.

"It is apparent that the mere fact of classification is not sufficient to relieve a statute from the reach of the equality clause of the Fourteenth Amendment, and that in all cases it must appear not only that a classification has been made, but also that it is one based upon some reasonable ground—some difference which bears a just and proper relation to the attempted classification—and is not a mere arbitrary selection."

In the case of Yick Wo vs. Hopkins, 118 U. S. 356, 369 (1886), Mr. Justice Matthews said:

"The Fourteenth Amendment to the Constitution is not confined to the protection of citizens. It says, 'Nor shall any State deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.' These provisions are universal in their application to all persons within the territorial jurisdiction, without regard to any differences of race, of color, or of nationality; and the equal protection of the laws is a pledge of the protection of equal laws."

If the Fourteenth Amendment guarantees the protection of equal laws entirely irrespective of race or nationality, its provisions cannot be evaded by any such basis of classification as that adopted in the act under discussion. There is no difference between aliens and citizens as classes that would justify such discrimination against and interference with the personal and property rights of the former for the declared purpose of the protection of the game of the State.

It would be as logical to urge, upon the ground of proper classification, the constitutionality of a statute limiting the destruction of property for the purpose of preventing the spread of fire to that of aliens alone, as to urge as constitutional one that makes property, innocent in itself, a public nuisance and liable to confiscation only when in the possession or under the control of an alien resident.

It is therefore apparent that under the guise of a game law the Legislature of Pennsylvania has passed an act which violates the Fourteenth Amendment by depriving aliens within its jurisdiction of their liberty and property without due process of law and by denying them the equal protection of the law.

POINT II.

The Act is in Contravention of the Existing Treaty Between the United States and Italy.

The pertinent articles of the Treaty of Commerce and Navigation between the United States and Italy, concluded February 26, 1871, 17th Statutes at Large (Treaties), page 845, are the following:

Article II.

"The citizens of each of the high contracting parties shall have liberty to travel in the States and Territories of the other, to carry on trade,

wholesale and retail, to hire and occupy houses and warehouses, to employ agents of their choice, and generally to do anything incident to or necessary for trade upon the same terms as the natives of the country, submitting themselves to the laws there established."

ARTICLE III.

"The citizens of each of the high contracting parties shall receive, in the States and Territories of the other, the most constant protection and security for their persons and property, and shall enjoy in this respect the same rights and privileges as are or shall be granted to the natives, on their submitting themselves to the conditions imposed upon the natives."

. . . . . .

ARTICLE XXIV.

"The United States of America and the Kingdom of Italy mutually engage not to grant any particular favor to other nations, in respect to commerce and navigation, which shall not immediately become common to the other party, who shall enjoy the same freely if the concession was freely made, or on allowing the same compensation if the concession was conditional."

Under the terms of the last cited Article the provisions of the Convention of Friendship, Commerce and Extradition between the United States and Switzerland, proclaimed November 9, 1855 (11 Statutes at Large, 597), are available to Italian subjects in America.

The first article of the said convention with Switzerland is as follows:

ARTICLE I.

"The citizens of the United States of America and the citizens of Switzerland, shall be admitted and treated upon a footing of reciprocal equality

in the two countries, where such admission and treatment shall not conflict with the constitutional or legal provisions, as well Federal as State and cantonal, of the contracting parties. The citizens of the United States and the citizens of Switzerland, as well as the members of their families, subject to the constitutional and legal provisions aforesaid, and yielding obedience to the laws, regulations, and usages of the country wherein they reside, shall be at liberty to come, go, sojourn temporarily, domiciliate or establish themselves permanently, the former in the Cantons of the Swiss Confederation, the Swiss in the States of the American Union, to acquire, possess, and alienate therein property, (as is explained in Article V); to manage their affairs; to exercise their profession, their industry, and their commerce; to have establishments; to possess warehouses; to consign their products and their merchandise, and to sell them by wholesale or retail, either by themselves or by such brokers or other agents as they may think proper; they shall have free access to the tribunals, and shall be at liberty to prosecute and defend their rights before courts of justice in the same manner as native citizens, either by themselves or by such advocates, attorneys, or other agents as they may think proper to select. No pecuniary or other more burdensome condition shall be imposed upon their residence or establishment, or upon the enjoyment of the above mentioned rights, than shall be imposed upon citizens of the country where they reside, nor any condition whatever to which the latter shall not be subject.

"The foregoing privileges, however, shall not extend to the exercise of political rights, nor to a participation in the property of communities, corporations, or institutions of which the citizens of one party, established in the other, shall not have become members or co-proprietors."

By the aforesaid Article II, Italian subjects are guaranteed the same unrestricted right to carry on

trade of any nature in the State of Pennsylvania as natives of the United States, but the inevitable effect of the act in question is to prevent their manufacturing or trading in the specified firearms absolutely, as it prevents them from having such instruments in their possession for any purpose whatsoever. Thus they are excluded from what might prove very lucrative vocations of trade and commerce. There is no pretense that the deprivation of these rights is based upon the ground of public safety but simply because it is possible for such firearms to be used for the purpose of shooting game contrary to local law.

By virtue of the provisions of Article III, Italian subjects are guaranteed the same rights and privileges in respect to the protection and security of their persons and property as natives of the United States, but the act in question violates said article in several respects.

It is usual for native farmers to own shotguns for the purposes of protecting their crops from birds, their poultry from hawks, and their sheep from dogs and other marauders. But the Italian resident farmer would be precluded from owning such instruments for the same purposes notwithstanding there might be no other effective means of protecting such property and although the birds be of a class referred to by the court in the case of In Re Marshall, 102 Fed. 325 (1900), where it was said:

> "Such birds are well-known pests and are unfit for human food and are, therefore, not within the purview of the police power, in respect to game, the source of which, said the Supreme Court in Geer vs. Connecticut, . . . flows from the duty of the State to preserve for its people a valuable food supply."

The Pennsylvania Act of May 18th, 1875, forbids the carrying of concealed deadly weapons, and as by

the provisions of the act under discussion aliens are forbidden to possess shotguns it naturally follows that they are practically prohibited from owning firearms of any description, no matter how serious and imminent may be the danger to their persons; and under no circumstances can they own any long-ranged firearms which are the most usual weapons to defend homes and property from attack. While the provisions of the act allow them to kill animals in defense of their person or property, they are forbidden to employ the only effective means for such purpose.

The terms of the act are most extreme and one can imagine an alien being subjected to its provisions if he should be possessed of one of the indicated weapons through disarming a would-be murderer or homicidal maniac who had attacked him, as the mere possession of a shotgun or rifle is conclusive proof of guilt and no defense can be offered.

In its opinion, the learned Superior Court of Pennsylvania stated:

> ". . . Is it a reasonable construction to hold that it [the treaty] was intended to clothe unnaturalized foreign-born residents with the same rights, immunities and advantages as are conferred solely as a privilege on citizens? The whole trend of our decisions is against such an interpretation. The terms of the treaty provide for the protection and security of their persons and property, and in this respect,—to such protection and security,—the enjoyment of the same rights and privileges as are or shall be granted to the natives on their submitting themselves to the conditions imposed on the natives.
>
> "An unnaturalized foreign-born resident cannot comply with the conditions imposed on a native-born or naturalized resident. Article XIV of the Federal Constitution defines this condition: 'All persons born or naturalized in the United States and subject to the jurisdiction thereof are citizens of the United States, and of

> the States wherein they reside.' It would be a perversion of language to hold that the phrase,—the same rights and privileges as are or shall be granted to the natives, was intended to or could embrace all the regulations affecting our franchise rights; the administration and execution of our laws; the special rights granted as privileges by our Government to particular classes of our citizens. Such a construction would render nugatory the qualification for President of the United States as provided by Art. II, Sec. 1, par. 5, of our Federal Constitution and other limitations that are made equally explicit in our fundamental law."

With the greatest deference for the opinion of the learned Superior Court of Pennsylvania, it is respectfully submitted that the wording of the treaty is sufficiently plain and explicit to show that the contracting parties intended that their subjects should at least enjoy in the territory of each other the same liberty of carrying on trade and protection and security of their persons and property as natives under like conditions. In the case cited in the opinion (Maiorano vs. Baltimore & Ohio Railroad Co., 213 U. S. 268) the question at issue concerned a certain right non-existent at common law, and this Honorable Court expressly distinguished that new right from those already possessed by the subjects of Italy which were protected by the terms of the treaty.

It is not contended that Italian subjects are entitled under the treaty to all the rights and privileges of citizenship. It is recognized that certain privileges, as those noted, may be bestowed in consequence of citizenship. For example, the right to sell liquor differs materially from the enjoyment of one of the inherent rights of mankind.

As was stated by Mr. Justice Field in Crowley vs. Christianson, 137 U. S. 91 (1890), which case was distinguished from Yick Wo vs. Hopkins, supra, "There

is no inherent right in a citizen to thus sell intoxicating liquors by retail; it is not a privilege of a citizen of the State or of a citizen of the United States."

But all fundamental rights which in any way relate to the carrying on of trade, or the protection and security of person and property are secured to Italian citizens under the same conditions as natives, entirely irrespective of the Fourteenth Amendment to the Constitution of the United States. Blackstone mentions security to the person as one of the fundamental rights and he also recognizes the right to possess firearms necessary for protection under proper restrictions.

The learned Superior Court of Pennsylvania describes the plaintiff in error as being "one of a very large class of aliens, whose sojourn in the country is but temporary and whose place of abode is capricious and uncertain; who cannot speak our language nor understand our customs or laws, who pay no taxes and share no part of the public burden." But there is nothing in the record to indicate to what class of society he may belong, and it is submitted that the rights guaranteed by the treaty may be availed of by any Italian subject whatsoever without any distinction of class, whether he be a wealthy merchant or the lowliest workingman.

Moreover, the terms of the act are not limited to any class or nationality whatsoever. They apply with equal force to the Anglo-Saxon and Teutonic as well as the Celtic and Slavonic races, and, under the Most Favored Nation clauses of the different international treaties with America, could be objected to by almost any nationality. An alien merchant or manufacturer who may have spent most of his lifetime in Pennsylvania, adding to its wealth as well as his own, not only may not shoot game, upon his own land, which has been held a right of property in State vs. Mallory, 73 Ark. 236 (1904), but he is not allowed the possession of a

shotgun or rifle upon such property for the protection thereof, or for use in hunting game in other States where he might lawfully shoot under regulations applying to non-resident aliens.

But the act in question goes further than the subject of game and prevents resident aliens as a class from collecting and exhibiting rare specimens of such arms, whether for pleasure or for sale; or from using them for the innocent divertment of shooting clay pigeons or the instructive occupation of marksmanship. In fact, in the case of Commonwealth vs. Maloof, 49 Pa. Superior, 581 (1912), it was held that the defendant (nationality not stated), who was agent of the licensee of a shooting gallery, in the management of that business, was guilty under the act and the confiscation of a Winchester and a Remington rifle that were used at the time of seizure for target practice in the gallery was permitted.

In the case of In Re Marshall, 102 Fed. 323 (1900), Ross, J., said:

> "But surely in a case like the one at bar, where there is no question of the public safety, public health, or public morals, and where the prohibited act is in no respect *malum in se*, the absolute prohibition of the use of one's own property on his own land cannot be held to be a reasonable exercise of the police power, when regulation will plainly attend the end desired by the legislation in question."

No State may prohibit the possession of any lawful article of trade and commerce to Italian subjects and at the same time allow its possession by natives without violating the quoted treaty provisions.

In addition to violating the Italian treaty in the manner indicated the Pennsylvania Act of Assembly violates the provisions of the quoted article of the treaty with Switzerland by imposing upon Italian sub-

jects more burensome conditions and other conditions in respect to the possession of property and the exercise of commerce than are imposed upon natives.

While the State of Pennsylvania may restrict the right to hunt game to its own citizens, it cannot under the cover of a game regulation forbid the possession of the specified firearms to an Italian subject, and grant this right to its own citizens and citizens of other states, without infringing upon the provisions of the treaty.

Treaties are the supreme law of the land and all state authority is subordinate thereto. The authorities will not be cited as they have been referred to as recently as Maiorano vs. Baltimore & Ohio Railroad Co., supra.

It does not necessarily follow that because the states and the people have certain reserved rights in respect to subjects which have been delegated to Congress that the power of the Federal Government is restricted or qualified in the same manner in respect to treaties.

Especially is this true of a treaty which is self-executing and requires no legislative action to put its terms into effect.

For example, there are no limitations in respect to the judicial power.

In Colorado vs. Kansas, 206 U. S. 46, 80 (1907), Mr. Justice Brewer said:

> ". . . It is no longer open to question that by the Constitution a nation was brought into being, and that that instrument was not merely operative to establish a closer union or league of States. Whatever powers of government were granted to the nation or reserved to the States (and for the description and limitation of those powers we must always accept the Constitution as alone and absolutely controlling) there was created a nation to be known as the United States

of America, and as such then assumed its place among the nations of the world.

". . . In the Constitution are provisions in separate articles for the three great departments of government—legislative, executive and judicial. But there is this significant difference in the grants of powers to these departments: The first article, treating of legislative powers, does not make a general grant of legislative power. It reads: 'Article I, section 1, all legislative powers herein granted shall be vested in a Congress,' etc.; and then in Article VIII mentions and defines the legislative powers that are granted. By reason of the fact that there is no general grant of legislative power it has become an accepted constitutional rule that this is a government of enumerated powers.

"In M'Culloch vs. State of Maryland, supra, 405, Chief Justice Marshall said:

" 'This government is acknowledged by all to be of enumerated powers. The principle, that it can exercise only the powers granted to it, would seem too apparent to have required to be enforced by all those arguments which its enlightened friends, while it was depending before the people, found it necessary to urge. That principle is now universally admitted.'

"On the other hand, in Article III, which treats of the judicial department—and this is important for our present consideration—we find that section 1 reads that 'the judicial power of the United States, shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish.' By this is granted the entire judicial power of the Nation. Section 2, which provides that 'the judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States,' etc., is not a limitation nor an enumeration. It is a definite declaration, a provision that the judicial power shall extend to —that is, shall include—the several matters particularly mentioned, leaving unrestricted the general grant of the entire judicial power. There

> may be, of course, limitations on that grant of power, but if there are any they must be expressed, for otherwise the general grant would vest in the courts all the judicial power which the new Nation was capable of exercising. . . ."

The Executive department is not referred to in the above opinion, but the language vesting the executive power in the President is similar to that used in respect to the judicial department. Consequently, the same interpretation as has been applied to the language granting the judicial power would apply to the executive power, as the same phrase is used. There is no limitation in words upon the authority given the President in respect to the making of treaties, excepting in so far as relates to the advice and consent of the Senate.

Article II, section 1-1, "The executive power shall be vested in a President of the United States of America." Section 2-2, "He shall have power by and with the advice and consent of the Senate to make treaties, provided two-thirds of the Senators present concur."

The treaty making power is both delegated to the Federal Government and prohibited to the States by the Constitution. The Tenth Amendment does not interfere with the subject and, on the contrary, in a negative way indicates that there is no reservation in respect to the treaty making power, as it provides that merely the powers not delegated to the United States nor prohibited by the Constitution to the States are reserved.

As was said by Mr. Justice Swayne, in Hauenstein vs. Lynham, 100 U. S. 484,

> ". . . If the national government has not the power to do what is done by such treaties, it cannot be done at all, for the States are expressly forbidden to 'enter into any treaty, alliance, or confederation,' Constitution, Article I, section 10. . . ."

As it may be argued, however, that an exception may exist in respect to the exercise of a police function by a State, it is submitted that it is absolutely immaterial under what guise of authority interference with a national treaty may be attempted as all State power must yield pro tanto when it comes in contact with any treaty provision.

In Jacobson vs. Massachusetts, 197 U. S. 11, 24, (1905), in which case the validity of a Statute of Massachusetts providing for compulsory vaccination was sustained, Mr. Justice Harlan stated:

> "The authority of the State to enact this statute is to be referred to what is commonly called the police power—a power which the State did not surrender when becoming a member of the Union under the Constitution. Although this court has refrained from any attempt to define the limits of that power, yet it has distinctly recognized the authority of a State to enact quarantine laws and 'health laws of every description;' indeed, all laws that relate to matters completely within its territory and which do not by their necessary operation affect the people of other States. According to settled principles the police power of a State must be held to embrace, at least, such reasonable regulations established directly by legislative enactment as will protect the public health and the public safety. Gibbons vs. Ogden, 9 Wheat., 1,210; Railroad Company vs. Husen, 95 U. S. 465, 470; Beer Company vs. Massachusetts, 97 U. S. 25; New Orleans Gas Co. vs. Louisiana Light Co., 115 U. S. 650, 661; Lawton vs. Steele, 152 U. S. 133. It is equally true that the State may invest local bodies called into existence for purposes of local administration with authority in some appropriate way to safeguard the public health and the public safety. The mode or manner in which those results are to be accomplished is within the discretion of the State, subject, of course, so far as Federal power is concerned, only to the condition that no rule pre-

scribed by a State, nor any regulation adopted by a local governmental agency acting under the sanction of state legislation, shall contravene the Constitution of the United States or infringe any right granted or secured by that instrument. A local enactment or regulation, even if based on the acknowledged police powers of a State, must always yield in case of conflict with the exercise by the general government of any power it possesses under the Constitution, or with any right which that instrument gives or secures. Gibbons vs. Ogdens, 9 Wheat. 1, 210; Sinnott vs. Davenport, 22 How. 227, 243; Missouri, Kansas & Texas Ry. Co. vs. Haber, 169 U. S. 613, 626."

In the matter of Heff, 197 U. S. 488, 505 (1905), Mr. Justice Brewer said:

"In this Republic there is a dual system of government, National and State. Each within its own domain is supreme, and one of the chief functions of this court is to preserve the balance between them protecting each in the powers it possesses and preventing any trespass thereon by the other. The general police power is reserved to the States, subject, however, to the limitation that in its exercise the State may not trespass upon the rights and powers vested in the general government. The regulation of the sale of intoxicating liquors is one of the most common and significant exercises of the police power. And so far as it is an exercise of the police power it is within the domain of state jurisdiction. It is true the national government exacts licenses as a condition of the sale of intoxicating liquors, but that is solely for the purposes of revenue and is no attempted exercise of the police power. A license from the United States does not give the licensee authority to sell liquor in a State whose laws forbid its sale, and neither does a license from a State to sell liquor enable the licensee to sell without paying the tax and obtaining the license required by the Federal statute. License Cases, 5 How. 504; Mc-

Guire vs. The Commonwealth, 3 Wall. 387; License Tax Cases, 5 Wall. 462. Now the act of 1897 is not a revenue statute, but plainly a police regulation. It will not be doubted that an act of Congress attempting as a police regulation to punish the sale of liquor by one citizen of a State to another within the territorial limits of that State would be an invasion of the State's jurisdiction and could not be sustained, and it would be immaterial what the antecedent status of either buyer or seller was. There is in these police matters no such thing as a divided sovereignty. Jurisdiction is vested entirely in either the State or the Nation and not divided between the two."

While it is contended that the treaty making power is absolutely unrestricted it is only reasonable to assume that its exercise must be limited to such purposes as are properly the subject-matter of international agreements. This point, however, can hardly enter into a consideration of the case in hand as protection and security of person and property and the liberty to carry on commerce have been the subjects of international treaties from the earliest times.

In Hauenstein vs. Lynham, supra, the validity of a treaty permitting non-resident aliens to inherent land notwithstanding the provisions of a state statute, was upheld.

In three states appellate courts have recognized that state laws in respect to the granting of letters of administration upon the estates of deceased aliens may be abrogated pro tanto by treaties with foreign nations, allowing the granting of letters of administration upon such estates to the consuls of their countries.

In re Wyman, 191 Massachusetts, 276.
In re Estate of Frank Scutella, dec'd, 125 New York Sup. 20.
Carpigiani vs. Hall, 172 Alabama, 287.

In a fourth State, In re Estate of Ghio [Rocca vs. Thompson], 157 Cal. 552, it was held that the language of the Argentine treaty did not guarantee to consuls the right to letters of administration upon the estate of their deceased nationals; but it was not intimated that a properly worded treaty should not prevail.

And while on appeal, the sustension of this construction of the treaty made a decision on the extent of the treaty making power unnecessary (Rocca vs. Thompson, 223 U. S. 317), nevertheless, Mr. Justice Day said:

> ". . . There is, of course, no Federal law of probate or of the administration of estates, and, assuming for this purpose that it is within the power of the National Government to provide by Treaty for the administration of property of foreigners dying within the jurisdiction of the States, and to commit such administration to the consular officers of the nations to which the deceased owed allegiance, we will proceed to examine the treaties. . . ."
>
> ". . . Had it been the intention to commit the administration of estates of citizens of one country, dying in another, exclusively to the consul of the foreign nation, it would have been very easy to have declared that purpose in unmistakable terms. For instance, where that was the purpose, as in the treaty made with Peru in 1887 (August 31, 1887, 25 Stat. 1444), it was declared in Art. 33, (p. 461), as follows:
>
> . . .
>
> "And in the convention between the United States and Sweden, proclaimed March 20, 1911, it is provided:"
>
> . . .

In conclusion, it is submitted that the Act of Assembly of Pennsylvania of May 8, 1909, violates the Constitution of the United States both in respect to the Fourteenth Amendment thereto and the treaty with Italy.

And consequently, that the judgment of the Supreme Court of Pennsylvania, affirming that of the Superior Court of said State, in which the judgment of the Court of Quarter Sessions of Allegheny County was affirmed, should be reversed.

MARCEL VITI,
Attorney for Plaintiff in Error.

9

No. 38.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1912.

Office Supreme Court, U. S.
FILED.
OCT 30 1913
CLERK.

~~No. 314~~

JOSEPH PATSONE, PLAINTIFF IN ERROR,

vs.

COMMONWEALTH OF PENNSYLVANIA.

APPEAL FROM THE SUPREME COURT OF THE STATE OF PENNSYLVANIA.

BRIEF FOR DEFENDANT IN ERROR

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In the Supreme Court of the United States

No. 314, October Term, 1912

JOSEPH PATSONE
Plaintiff in Error.

vs.

COMMONWEALTH OF PENNSYLVANIA.

BRIEF FOR DEFENDANT IN ERROR

COUNTER STATEMENT OF THE CASE.

The Act of Assembly alleged to have been violated was passed May 8th, 1909, (P. L. 466). The defendant was arrested October 19th, 1909. (Transcript of Record, p. 3.) The information charged that the defendant "being an unnaturalized foreign-born resident of this Commonwealth owns and has in his possession a shot-gun or rifle contrary to the Act of Assembly approved the eighth day of May, 1909." According to the petition of the defendant for an allowance of an appeal, the shot-gun was found in his house. The value of the gun is nowhere stated in the record. (Transcript of Record, pp. 4 and 5.) He was convicted after hearing and the sentence was

"That said Joseph Patsone, for the said offense, has forfeited the sum of $25 and costs, and in default of payment thereof be committed to the county jail for one day for each dollar of penalty imposed." (Transcript of Record, p. 5.)

There was no formal sentence that the "gun be declared forfeited to the Commonwealth of Pennsylvania," as provided in Section 1 of the Act of May 8th, 1909. Upon the conviction, an appeal was allowed by the Court of Quarter Sessions of Allegheny County, which appeal was so proceeded with that that Court declared that the "Act under which the defendant was adjudged guilty was clearly within the powers of the Legislature of the State," (Transcript of Record, p. 9) and the defendant adjudged guilty of the offense charged in the information.

The case was brought into the Superior Court of Pennsylvania, and that court, in an opinion by Judge Orlady, sustained the Court of Quarter Sessions of Allegheny County. *(44 Pa. Sup. Ct. 128)* (Transcript of Record, pp. 36-41.) Upon appeal to the Supreme Court of Pennsylvania, the case was affirmed in a per curiam, on the opinion of Judge Orlady, *(231 Pa. 46.)* (Transcript of Record, p. 41.), and is before this Court on a writ of error allowed by Mr. Justice Lurton.

BRIEF OF ARGUMENT.

Act of Assembly

The Act which is the subject of attack is entitled,

"An Act to give additional protection to wild birds and animals and game, within the Commonwealth of Pennsylvania; prohibiting the hunting

for, or capture or killing of, such wild birds or animals or game by unnaturalized foreign-born residents; forbidding the ownership or possession of shot-gun or rifle by any unnaturalized foreign-born resident, within the Commonwealth; and prescribing penalties for violation of its provisions." (P. 466, P. L. 1909.)

and is in part as follows:

"Section 1. Be it enacted, &c., That from and after the passage of this act, it shall be unlawful for any unnaturalized foreign-born resident to hunt for or capture or kill, in this Commonwealth, any wild bird or animal, either game or otherwise, of any description, except in defense of person or property; and to that end it shall be unlawful for any unnaturalized foreign-born resident, within this Commonwealth, to either own or be possessed of a shotgun or rifle of any make. Each and every person violating any provision of this section shall, upon conviction thereof, be sentenced to pay a penalty of twenty-five dollars for each offense, or undergo imprisonment in the common jail of the county for the period of one day for each dollar of penalty imposed: Provided, That in addition to the before-named penalty, all guns of the beforementioned kinds found in possession or under control of an unnaturalized foreign-born resident shall, upon conviction of such person, or upon his signing a declaration of guilt as prescribed by this act, be declared forfeited in the Commonwealth of Pennsylvania, and shall be sold by the Board of Game Commissioners as hereinafter directed.

"Section 2. For the purposes of this act, any unnaturalized foreign-born person who shall reside or live within the boundaries of the Common-

wealth of Pennsylvania for ten consecutive days shall be considered a resident, and shall be liable to the penalties imposed for violation of the provisions of this act.

"Section 3. That the possession of a shotgun or rifle at any place outside of building, within this Commonwealth, by an unnaturalized foreign-born resident, shall be conclusive proof of a violation of the provisions of section one of this act, and shall render any person convicted thereof liable to the penalty as fixed by said section.

"Section 4. That the presence of a shotgun or rifle in a room or house, or building or tent, or camp of any description, within this Commonwealth, occupied or controlled by an unnaturalized foreign-born resident, shall be prima facie evidence that such gun is owned or controlled by the person occupying or controlling the property in which such gun is found, and shall render such person liable to the penalty imposed by section one of this act."

CONTENTION OF PLAINTIFF IN ERROR.

This Act of Assembly is attacked, because;

First: It is a taking of property without due process of law, in violation of the Fourteenth Amendment to the Constitution of the United States.

Second: That it denies the equal protection of the laws, secured by that amendment.

Third: That it violates the treaty between the United States and the kingdom of Italy.

I.

This Act is a Valid Exercise of the Police Power.

It is conceded that this Act was passed in the exercise of the police power.

Therefore, it is not necessary to cite the authorities to show the extent to which the Courts have gone in sustaining the exercise of the police power. They are to some extent summarized in *Lawton* vs. *Steele, 152 U. S. 133, 136.*

But it is contended that it is an arbitrary exercise of that power, and, therefore it offends against the Fourteenth Amendment of the Constitution of the United States, which provides:

> "Nor shall any State deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

Test of Proper Exercise of Police Power.

If a statute purporting to be passed to protect public health, public morals, public safety and public welfare has real and substantial relation to those objects, it is a proper exercise of the police power, and the courts have been liberal in sustaining such statutes.

The purpose of the fourteenth amendment, as stated by Mr. Justice Miller in the *Slaughter-House Cases, 16 Wallace, 36,*

> "Was the freedom of the African race, the security and perpetuation of that freedom, and their

protection from the oppressions of the white men who had formerly held them in slavery?"

The learned Judge said, page 72:

"We do not say that no one else but the negro can share in this protection. Both the language and the spirit of these articles are to have their fair and just weight in any question of construction."

And on page 81:

"We doubt very much whether any action of a State not directed by any way of discrimination against the negroes as a class, or on account of their race, will ever be held to come within the purview of this provision.

The application of this amendment, however, has been much broadened since that decision, but it has never been driven to the length of putting aliens upon an absolute equality with citizens, as is contended for here.

In *Mugler* vs. *Kansas, 123 U. S., 623,* it is said (p. 660):

"It belongs to the legislative department to exert what are known as the police powers of the State, and to determine, primarily, what measures are appropriate or needful for the protection of the public morals, the public health, or the public safety.

"It does not at all follow that every statute enacted ostensibly for the promotion of these ends, is to be accepted as a legitimate exertion of the police powers of the State. There are, of necessity, limits beyond which legislation cannot right-

fully go. * * * * *If, therefore, a statute purporting to have been enacted to protect the public health, the public morals, or the public safety, has no real or substantial relation to those objects, or is a palpable invasion of rights secured by the fundamental law, it is the duty of the courts to so adjudge, and thereby give effect to the Constitution.*"

And on page 663:

"No one may rightfully do that which the lawmaking power, upon reasonable grounds, declares to be prejudicial to the general welfare.

"This conclusion is unavoidable, unless the Fourteenth Amendment of the Constitution takes from the States of the Union those powers of police that were reserved at the time the original Constitution was adopted. But this court has declared, upon full consideration, in Barbier *vs.* Connolly, 113 U. S., 27, 31, that the Fourteenth Amendment had no such effect. After observing, among other things, that that Amendment forbade the arbitrary deprivation of life or liberty, and the arbitrary spoliation of property, and secured equal protection to all under like circumstances, in respect as well to their personal and civil rights as to their acquisition and enjoyment of property, the court said: 'But neither the Amendment—broad and comprehensive as it is—nor any other amendment, was designed to interfere with the power of the State, sometimes termed its police power, to prescribe regulations to promote the health, peace, morals, education, and good order of the people, and to legislate so as to increase the industries of the State, develop its resources, and add to its wealth and prosperity.' "

And speaking of the Fourteenth Amendment, said, on page 665:

> "It has never been regarded as incompatible with the principle, equally vital, because essential to the peace and safety of society, that all property in this country is held under the implied obligation that the owner's use of it shall not be injurious to the community."

In *Plumley* vs. *Massachusetts, 155 U. S. 461,* it is held:

> "The judiciary of the United States should not strike down a legislative enactment of a State, *especially if it has direct connection with the social order, the health and the morals of its people, unless such legislation plainly and palpably violates some right granted or secured by the National Constitution, or encroaches upon the authority delegated to the United States for the attainment of objects of national concern.*"

In *Powell* vs. *Pennsylvania, 127 U. S., 678,* Mr. Justice Harlan, speaking of the power of the Court, said, (p. 684):

> *"It cannot adjudge that the defendant's rights of liberty and property, as thus defined, have been infringed by the statute of Pennsylvania, without holding that, although it may have been enacted in good faith for the objects expressed in its title, namely, to protect the public health and to prevent the adulteration of dairy products and fraud in the sale thereof, it has, in fact, no real or substantial relation to those objects."*
>
> *Silz* vs. *Hesterberg, 211 U. S., 31, 39.*

It is, therefore, settled, that the inquiry to be made

by the Court can extend no further than to ascertain whether the statute has a real and substantial relation to the police power. If it has, it must be sustained as such, and the function of the court, in this regard, is at an end.

Preservation of Game.

The preservation of game is within the police power of the state, and any law which tends to that preservation, is a valid exercise of the police power, if it has reasonable relation to that subject.

In *Geer* vs. *Connecticut, 161 U. S., 519*, the statute providing that

> "No person shall at any time kill any woodcock, ruffled grouse, or quail, for the purpose of conveying the same beyond the limits of the State, or shall transport, *or have in possession with intent to procure the transportation, beyond said limits, of any of such birds killed within this State*"

was sustained as not offending against the Constitution of the United States providing for due process of law. In that case, Mr. Justice White, in a learned examination of all of the laws, from the earliest traditions to the present time, showed that it was an attribute of our government to control the taking of animals *ferae naturae.*

Mr. Justice White said, (p. 534):

> The right to preserve game flows from the undoubted existence in the State of a police power to that end, which may be none the less efficiently called into play, because by doing so interstate commerce may be remotely and indirectly affected. *Kidd* vs. *Pear-*

son, 128 U. S., 1; *Hall* vs. *De Cuir,* 95 U. S., 485; *Sherlock* vs. *Alling,* 93 U. S., 99, 103; *Gibbons* vs. *Ogden,* 9 Wheat. 1. Indeed the source of the police power as to game birds (like those covered by the statute here called in question) flows from the duty of the State to preserve for its people a valuable food supply."

In *Lawton* vs. *Steele, 152 U. S., 133, 136,* it is also said (p. 138):

> "The preservation of game and fish, however, has always been treated as within the proper domain of the police power, and laws limiting the season within which birds and wild animals may be killed or exposed for sale, and prescribing the time and manner in which fish may be caught, have been repeatedly upheld by the Courts."

In *Silz* vs. *Hesterberg, 211 U. S., 31,* the Act in question prohibited the possession of certain game during the closed season. The relator, a dealer in imported game, was arrested for unlawfully having in his possession some of the prohibited kinds. The game which he had in his possession

> "Was lawfully taken, killed and captured in Russia during the open season for such game there, and thereafter sold and consigned to Silz in New York City * * * * * * Such imported golden plover and imported blackcock are different varieties of game birds from birds known as plover and grouse in the State of New York; they are different in form, size, color and markings from the game birds known as plover and grouse in the State of New York, and can be readily distinguished from the plover and grouse found in that State. And this is true when they are cooked and ready for the

table. The birds are sound, wholesome and valuable articles of food, and recognized as articles of commerce in different countries of Europe and in the United States."

Mr. Justice Day, speaking for the Court, said

"But, subject to constitutional limitations, the Legislature of the State is authorized to pass measures for the protection of the people of the State in the exercise of the police power, and is itself the judge of the necessity or expediency of the means adopted. *In order to protect local game during the closed season it has been found expedient to make possession of all such game during that time, whether taken within or without the State, a misdemeanor.* In other States of the Union such laws have been deemed essential, and have been sustained by the courts. *Roth* vs. *State*, 51 *Ohio St.*, 209; *Ex parte Maier*, 103 *Cal.*, 476; *Stevens* vs. *The State*, 89 *Md.*, 669; *Magner* vs. *The People*, 97 *Ill.*, 320. * * * * * * * * The object of such laws is not to affect the legality of the taking of game in other States, but to protect the local game in the interest of the food supply of the people of the State. We cannot say that such purpose, frequently recognized and acted upon, is an abuse of the police power of the State, and as such to be declared void because contrary to the Fourteenth Amendment of the Constitution."

It is certainly as much a taking of property, to forbid the possession of valuable food, taken in another country, as to forbid the possession of a gun or rifle. Both the laws have for their object the protection of game. The prohibition of the possession of a gun or rifle, by an alien, is vastly

more effective than the prohibition of the possession of game, shipped from out of the country, in the hands of a dealer.

To the authorities referred to in the opinion just cited, sustaining the validity of Acts of Assembly making a closed season for game and prohibiting the importation or exportation of game during the said closed season, may be added the following:

Kyle vs. *People, 226 Ill., 619, 80 N. E., 1081.*
Commonwealth vs. *Vincent, 108 Mass., 441.*
People vs. *Martin, 107 N. Y. S., 1076, 123 App. Div., 335.*
State vs. *Nergaard, 124 Wis., 414, 420.*
Dietrick vs. *Fargo, 194 N. Y., 359, 87 N. E., 518.*
People vs. *Setunsky, 126 N. W., 844 (Mich.).*
Rupert vs. *U. S., 181 Fed., 87.*
Smith vs. *State, 155 Ind., 611, 51 L. R. A., 404.*
State vs. *Snowman, 94 Me., 99, 50 L. R. A., 544.*
State vs. *Heger, 194 Mo., 707, 93 S. W., 252.*
State vs. *Roberts, 59 N. H., 256.*

Smith vs. *State,* supra, held that the statute is not in violation of the Fourteenth Amendment *even as to persons in possession of quail in the closed season which were acquired during the open season.*

If the Legislature, in the exercise of its police power, may make a closed season; if it may prevent in the closed season, the possession of valuable property, acquired during the open season; if it may prohibit the shipment out of the State in the closed season of such valuable property, acquired when it was lawful to acquire it; if it may prohibit the possession, in the closed season, of property shipped into the State from a foreign country, at

a time when it was lawful both in the foreign country and in the State to ship and receive it, it certainly can prohibit, as an incident to its protection of game, the possession of a gun or rifle by an unnaturalized foreigner. The latter is no more a taking of property without due process of law than any of the instances mentioned.

Tested by these principles, it being admitted that the preservation of game is a subject for police regulation, has this Act of Assembly a reasonable relation to the preservation of game?

It is entitled "An Act *to give additional protection to wild birds and animals and game,* within the Commonwealth of Pennsylvania."

It prohibits the hunting of game by unnaturalized, foreign-born residents and, as a corollary, to make that prohibition more effective, it prohibits the possession of a gun or rifle by such aliens.

Do not these prohibitions closely relate to the protection of game? Guns and rifles are the instruments with which wild birds and animals are usually killed.

DOES NOT A LAW PROHIBITING ALIENS TO OWN A SHOT GUN HAVE A REASONABLE RELATION TO THE PROTECTION OF GAME?

Suppose it is the experience of the State of Pennsylvania that unnaturalized foreigners have no respect for the game laws, that they cannot understand, or, if they understand, refuse to regard the prohibition against killing game, or any laws affecting the closed seasons; that foreigners in many places live in camps, are taken from place to place on contract work, and their prosecution for violation of the game laws is ineffectual because they protect and conceal each other; that, therefore, the laws making it a penalty to kill

game did not preserve effectually the game of the Com
monwealth; that the violations of the game law wer
largely perpetrated by foreigners. Would this no
show a reasonable relation between the preservation o
game and the prohibition to an alien of the means o
destruction of game?

The Court does not need to know this is the fact (a
it is). It only needs to find a reasonable ground fo
the provisions of the law.

Therefore, the possession of a gun or rifle, bein
carried about by a foreigner, was made conclusive evi
dence of his ownership. The possession of a gun or rif
in the house, building, tent, or camp, was made prim
facie evidence, and ownership of the usual instrumen
for destroying game was forbidden to those who othe
wise refused to obey the law.

As was said by Judge Orlady, in the Superior Cour
of Pennsylvania, in this case, of the Plaintiff in Erro

> "He is one of a very large class of aliens, whos
> sojourn in the country is but temporary and whos
> place of abode is capricious and uncertain, who can
> not speak our language nor understand our cus
> toms or laws."

Pennsylvania Legislation

The Legislature of Pennsylvania has made strenuou
efforts to protect game and fish without resorting to th
prohibition contained in the Act of 1909.

As early as 1878, (P. L. 160) it passed a comprehen
sive statute, making a closed season for various kind
of game and fish, and regulating the manner of huntin
and fishing, and required licenses from non-resident
for certain purposes.

In 1897 (P. L. 123) it passed another and more com
prehensive statute, making extensive closed season
requiring certificates to be granted for certain pu
poses, and regulating the manner of hunting, the nu

ber of game to be taken by any one person, and prohibiting the shipment out of the state.

In 1903 (P. L. 163) it increased its game protectors from 10 to 57, one for each county.

By the Act of April 24, 1901, non-resident gunners were required to secure a license before hunting in the Commonwealth and fines and seizures of the guns were provided for its violation.

A more drastic act was passed two years later viz.: the Act of April 14, 1903, P. L. 178, "*requiring non-resident hunters and unnaturalized foreign born resident hunters to procure a license for hunting in this commonwealth,*" and providing penalties for violation of the act, and investing the proper officers with larger powers for its enforcement.

In 1905 (P. L. 201) it authorized the creation of special deputy game protectors without limit.

And in 1905 (P. L. 248) it passed a second statute providing for closed seasons, prohibiting transportation out of the state, and forfeiture of property used in violating the law.

In 1907 it passed five separate acts for the further protection of deer (P. L. 70), rabbits and hare (P. L. 72), woodcock and many other birds (P. L. 74), birds other than game birds (P. L. 186), and prohibited also (P. L. 329) the use of automatic guns, by any person, for killing game or wild birds within the Commonwealth.

But this series of efforts to protect the game of Pennsylvania was found totally inadequate as to aliens because of their total disregard for game laws.

Therefore, when regulation failed, prohibition became necessary, and the Act of 1909, now attacked, was passed.

Who shall say, with such information and experience before the Legislature, that this prohibition of the possession of guns and rifles, by unnaturalized foreigners, has not a real and substantial relation to the preservation of game?

Therefore, the protection of game being within the police power, an Act of Assembly which prohibits aliens from owning shotguns and rifles "to give additional protection to wild birds, animals and game," which provides for the confiscation only after judgment of the Court, is not a taking of property without due process of law.

THE ACT OF ASSEMBLY PROVIDES FOR A HEARING

Section One of the Act does not permit the confiscation of a gun without a hearing. It provides that

> "In addition to the before-named penalty all guns of the before-mentioned kinds, found in possession or under control of an unnaturalized foreign-born resident, shall, *upon conviction of such person*, or upon his signing a declaration of guilt, as prescribed by this Act, be declared forfeited to the Commonwealth of Pennsylvania."

By section four it is provided that the presence of a shotgun or rifle in a room or house, or building or tent, or camp of any description, within this Commonwealth, occupied or controlled by an unnaturalized foreign-born resident, shall be *prima facie evidence* that such gun is owned or controlled by the person occupying or controlling the property in which such gun is found, and shall render such person liable to the penalty imposed by section one of this Act.

Section one provides that it shall be unlawful for unnaturalized, foreign-born residents to kill wild birds or animals and, *to that end*, it shall be unlawful for an unnaturalized, foreign-born resident, within this Commonwealth, to either own or be possessed of a shotgun or rifle of any make.

The defendant had his trial. The evidence of his

possession and ownership of the gun was *prima facie evidence* only. He chose to offer no evidence in his own behalf. (Transcript of Record, pp. 4, 5). He had his day in court, his gun could not be confiscated except by the judgment of the Court. Therefore, he was afforded due process of law.

Plaintiff in error suggests that a hearing would be futile and that such hearing does not afford due process. This Court in a line of cases, of which *French* vs. *Barber Asphalt Paving Co., 181 U. S., 324,* is a conspicuous example, holds that laws which provide for assessments of benefits for street improvements according to the foot front rule do not offend against the Fourteenth Amendment, because the assessment is made by a municipal official, such as a city surveyor, and according to a mathematical calculation, if they provide that the surveyor shall afford a hearing.

In Re Construction of Statute Complained Of:

It is further argued by the Plaintiff in Error, that the Act in question denies him the right of possession of a shot-gun or rifle for the purpose of defense of person or property, and that the act is, therefore, for this reason, unconstitutional as violative of fundamental rights of person and property.

But, the Act expressly provides:

> "That it shall be unlawful * * * * * * to kill any wild bird * * * * *except in defense of the person or property,* and to that end it shall be unlawful to own a shot gun."

It will first be noted, at the outset, that there is nothing in the record to show that Plaintiff in Error had possession of the gun for such purpose of defense, and therefore, nothing to show that such alleged right was, in fact, invaded or violated, in his case. Plaintiff in

error had full opportunity on his appeal to the Court of Quarter Sessions of Allegheny County, to show that he had possession of the gun for defense of person or defense of property, if such were the fact. He did not, however, do so; therefore, the question whether or not he had a constitutional right to possess the gun for such defense, and whether such alleged right was, in fact, invaded by the statute, is not before the Court for adjudication on the appeal in this case. *Yazoo, etc., R. R.* vs. *Jackson Vinegar Co., 226 U. S., 217* (1912) *in fra.*

Secondly, even if this question were before the Court, and if we were to concede (which we do not) that in consequence of something contained in the 14th amendment, or elsewhere in the Federal Constitution, or in the Treaty, it was beyond the power of the State of Pennsylvania to prohibit aliens from possessing fire-arms as the one effective means to accomplish the object of the State statute, then it would seem clear, under familiar principles of statutory construction, that from this very fact (if such were the fact) the statute does not have the legal effect for which Plaintiff in Error so contends. That is to say, if the position of the plaintiff in error is a sound one (which we deny), to wit, that the right of an alien to possess fire-arms is one of his inherent rights, protected by the Constitution, and in this respect is distinguishable from the right to sell intoxicating liquors, which he concedes and this Court has held is not an inherent right, then the construction which he seeks to put upon the statute is one which is not only in derogation of a common, fundamental or inherent right, but is also one which would operate to render the act unconstitutional and void.

The rule of law is that a statute is always to be construed, wherever reasonably possible, in such wise as not to invade a common, fundamental or inherent right.

It is another well-settled principle of law that the presumption always is that the legislature enacts its stat-

utes in view of the limitation imposed upon its powers by the supreme law, *i. e.* constitution or treaty, and that it does not intend that its provisions shall have an unconstitutional effect. From this, the rule is a universal one—and, especially so in this Court—that wherever two constructions of an act, whose constitutionality is attacked, are possible, one of which would render the act unconstitutional, and void, and the other of which would render it constitutional and valid, the latter is the one which will be adopted. Thus in *U. S.* vs. *Del. & Hudson Co., 213 U. S., 366*, p. 407, White, C. J., said:

> "It is elementary when the constitutionality of a statute is assailed, if the statute be reasonably susceptible of two interpretations, by one of which it would be unconstitutional, and by the other valid, it is our plain duty to adopt that construction which will save the statute from constitutional infirmity. *Knights Templar Indemnity Co.* vs. *Jarman, 187 U. S., 197-205.* Unless this rule be construed as meaning that our duty is to first decide that the statute is unconstitutional, and then proceed to hold that such ruling was unnecessary because the statute is susceptible of a meaning which causes it not to be repugnant to the constitution, the rule plainly must mean that where a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise, and by the other of which such questions are avoided, our duty is to adopt the latter. *Harriman* vs. *Interstate Commerce Commission, 211 U. S., 407.*"

A further equally well settled rule of law is that a penal statute such as this is, is always strictly construed and unless the act charged as being within the penal provision of the act, is clearly within both the spirit and the letter of such provision; it will be held not to be.

In the light of these rules of law, the construction put upon the act by the Plaintiff in Error in an effort to have this Court declare it unconstittuional and void as against the decision of the Superior and Supreme Courts of the State of Pennsylvania, is one which, we submit, cannot be sustained. The language of the act is not such as to clearly require such construction—that the Plaintiff in Error is deprived of the right to possess fire-arms for self-defense and protection of property—if such right be a common, fundamental or inherent one, as Plaintiff in Error contends, as the very basis of his argument. The main purpose and object of the statute, with reference to which all its subsidiary provisions are to be construed, manifestly is to preserve the game and wild animal supply of the State as food for the people of the State, by prohibiting its destructive killing at the hands of the alien class of people resident within its borders. The controlling or dominant prohibition of the statute, is just that, and but for that, it is quite apparent that the statute and none of its provisions, would have been enacted. But, said prohibition of the killing of game, etc., is, itself, not an absolute one, for, in express terms, the enacting clause of the statute specifically excepts from said prohibition, the case of *killing of game or other wild animals by the alien in defense of property or of person,* (See section 1), and then the statute goes on to provide, in immediate connection therewith, that, "*to that end,* it shall be unlawful for any unnaturalized, foreign-born resident within this Commonwealth to either own or be possessed of a shot-gun or rifle, etc." The connecting phrase "to that end" refers to and means the end or object of protecting the game against destructive killing, "defense of person or property," however, being always excepted. Since the prohibition of the possession of guns, is, itself, but the means adopted by the legislature to attain this end and object of the act,

above stated, the proper interpretation of its enacting clause, to which all the other provisions in the act are subsidiary, may be expressed as if the act read, instead, as follows: "And to that end, except in defense of person or property, it shall be unlawful for any unnaturalized, foreign-born resident within this Commonwealth to either own, or be possessed of a shot-gun or rifle, etc." There is certainly, in the words used, nothing clearly expressing a contrary meaning, if it be true that such contrary meaning, as Plaintiff in Error contends, be one which would render the act unconstitutional, and would also be one which would be in derogation of the common right of the alien. The subsidiary provisions of section 3 and 4 of the statute are in harmony, and in no wise conflict, with this interpretation.

It results, therefore, that there is nothing in the statute to support plaintiff's contention, that said statute is unconstitutional and void as violating the right of an alien to "defense of person and property" by the use of fire-arms, if such right of defense of person and property by means of fire-arms were in point of fact and law, a common, inherent and constitutional right of the alien, protected by the 14th amendment or the treaty invoked by Plaintiff in Error.

Defendant in Error contends that it is not necessary so to construe the act, in order to sustain it. If it be so construed, much of the argument against it, falls. If, by construing it, it saves constitutionality, it should be thus construed.

Is The Situation Changed Because the Gun Is In Itself Harmless?

The state not only has the right to prohibit the killing of game, but also the right to prohibit the

possession of the instruments of killing, even though harmless in themselves.

The defendant in error strenuously contends that a shot-gun or a rifle is not necessary to a foreigner, within the bounds of Pennsylvania, for the protection of his person or property.

The plaintiff in error urges that because he is deprived of owning a shot gun or rifle he is deprived of the means of protecting his life and property. There is no provision in the Constitution of the United States for the protection of life or property which this act of assembly can offend except the Fourteenth Amendment.

It is true Article II of the Amendments to the Constitution of the United States, provides:

> "The right of the people to keep and bear arms shall not be infringed,"

but it is held that this amendment "is a limitation only of the power of Congress and the National Government, and not of the States."

This is not a right granted by the Federal Constitution, nor is it in any manner dependent upon that instrument for its existence, and a declaration that it shall not be infringed means no more than it shall not be infringed by Congress.

> *U. S.* v. *Cruikshank, 92 U. S., 42.*
> *Tresser* v. *Ills., 116 U. S., 252.*

Moreover, the plaintiff in error not being a citizen of the State of Pennsylvania, has no guaranteed right under the Constitution of that State, to keep and bear arms.

See Section XXI of Art. I, Declaration of Rights, Const. of Pa.

Even if he had, the State of Pennsylvania has not prohibited an alien from possessing a revolver which is perhaps the natural weapon of self-preservation, when any kind of weapon is necessary, except to the extent of prohibiting the carrying of concealed deadly weapons, and such acts have been uniformly sustained.

5 Am. & Eng. Ency. of Law (2nd ed.), 729.
English v. *State, 35 Tex., 473; 14 Am. St. Rep., 374.*
Ex parte Cheney, 90 Cal., 617, 27 Pac., 463.

In a word, a gun is simply property, with no superior sanctity or inviolability over other property, since under the constitution of the State, all men are declared to have the inherent right "of acquiring, possessing and protecting *property*" (Const. Pa., Art. I, Sec. 1).

And all property, shot guns and rifles included, is held subject to the exercise of the police power.

Powell v. *Comm., 127 U. S., 678.*
N. Y., Etc., v. *Bristol, 151 U. S., 556.*
Mugler v. *Kansas, 123 U. S., 663.*

In the authorities which follow it is demonstrated that the possession of instruments or property harmless in themselves may be prohibited as a preventive measure, and to provide against the temptation for the misuse of the same; or the possession thereof may be permitted for one purpose only.

In *Powell* vs. *Pennsylvania, 127 U. S., 678,* it is held:

"The prohibition of the manufacture out of oleaginous substances, or out of any compound thereof other than that produced from unadulterated milk or cream from unadulterated milk, of an article designed to take the place of butter or cheese produced from pure unadulterated milk or

cream from unadulterated milk; or the prohibition upon the manufacture of any imitation or adulterated butter or cheese, or upon the selling or offering for sale, or having in possession with intent to sell, the same, as an article of food, is a lawful exercise by the State of the power to protect, by police regulations, the public health."

And that,

"The Statute of Pennsylvania of May 21, 1885, 'for the protection of the public health, and to prevent adulteration of dairy products and fraud in the sale thereof' neither denies to persons within the jurisdiction of the State the equal protection of the laws; nor deprives persons of their property without that compensation required by law; and is not repugnant in these respects to the Fourteenth Amendment to the Constitution of the United States."

In *Silz* vs. *Hesterberg, 211 U. S., 31,* it is held:

"The sections of the Forest, Fish and Game Law of the State of New York, which prohibit possession of game during the closed season, are a valid exercise of the police power of the State, and are not in conflict with the Constitution of the United States, either as depriving persons importing game of their property without due process of law, or as an interference with, or a regulation of, interstate commerce."

In *Purity Extract Co.* vs. *Lynch, 226 U. S., 192,* decided December 2, 1912, it is said:

"A State may, in the exercise of its police power, prohibit the sale of intoxicating liquor, and to the end of making the prohibition effectual

may include in the prohibition beverages which separately considered may be innocuous; and so held as to Poinsetta, a beverage containing a small percentage of malt.

"The court has no concern with the wisdom of exercising the police power, and unless the enactment has no substantial relation to a proper purpose, cannot declare that the limit of legislative power has been transcended."

In *Fisher* vs. *McGirr, 67 Mass., 1,* Mr. Justice Shaw, holding that the statute making it unlawful to keep or have liquor deposited for sale, said, pages 26 and 27:

"We think it manifest that the legislature, in the system of measures, proposes to accomplish one and the same object, by two distinct modes of proceeding. The general purpose is to prevent or diminish the evils of intemperance, by the punishment of an indiscriminate sale of spirituous liquors; but the particular purpose in this series of measures is, to prevent such liquors from being kept in any place, by any person, for the purpose or intent that they shall be sold. *Although crimes and offenses, punishable by law, consist in acts done, and not in the mere unexecuted purposes and intentions, yet the more effectually to accomplish the great and salutary purpose of laws necessary to the well being of society, acts and conduct, which would be innocent or indifferent in themselves, are often declared unlawful and made punishable, if done with an intent and purpose, which will render them noxious or dangerous, and where, should the law wait till the criminal intent is carried out into action, irremediable mischief will be done. The law is preventive as well as remedial.*"

"We have no doubt that it is competent for the legislature to declare the possession of certain ar-

ticles of property, either absolutely, or when held in particular places, and under particular circumstances, to be unlawful because they would be injurious, dangerous or noxious; and by due process of law, by proceeding *in rem*, to provide both for the abatement of the nuisance and the punishment of the offender by the seizure and confiscation of the property by the removal, sale or destruction of the noxious articles."

This Pennsylvania statute is exactly within this category. It is preventive as well as remedial. It has one general purpose, to preserve game, and two modes of effecting the purpose; one to forbid the killing, and one to forbid in that class of persons who have no respect for the game laws, the possession of the means of killing.

In the leading case of *Lawton* vs. *Steele, 152 U. S., 133*, the statute of New York was declared valid. It provided that

"Any net, pound, or other means or device for taking or capturing fish, or whereby they may be taken or captured, set, put, floated, had, found, or maintained, in or upon any of the waters of this State, or upon the shores of or islands in any of the waters of this State, in violation of any existing or hereafter enacted statutes or laws for the protection of fish, is hereby declared to be, and is, a public nuisance, and may be abated and summarily 'destroyed' by any person, and it shall be the duty of each and every protector aforesaid and of every game constable to seize and remove and forthwith destroy the same, * * * *"

It will be noticed that there is no provision for a hearing and forfeiture only after judgment and con-

viction, but that any net for taking or capturing fish, or whereby they may be taken or captured, is forfeited, notwithstanding the net may not be in use or have been used for the purpose, and in this case nets of the value of $525 were confiscated without hearing and the forfeiture sustained.

Mr. Justice Brown, delivering the opinion of the Court, says, (p. 139):

> *"The main and only real difficulty connected with the act in question is in its declaration that any net, etc., maintained in violation of any law for the protection of fisheries, is to be treated as a public nuisance, 'and may be abated and summarily destroyed by any person,* and it shall be the duty of each and every protector aforesaid and every game constable to seize, remove and forthwith destroy the same.' *The legislature, however, undoubtedly possessed the power not only to prohibit fishing by nets in these waters, but to make it a criminal offense, and to take such measures as were reasonable and necessary to prevent such offenses in the future. It certainly could not do this more effectually than by destroying the means of the offense.* If the nets were being used in a manner detrimental to the interests of the public, we think it was within the power of the legislature to declare them to be nuisances, and to authorize the officers of the State to abate them. *Hart* vs. *Albany, 9 Wend., 571; Meeker* vs. *Van Rensselaer, 15 Wend., 397.* * * * In this case there can be no doubt of the right of the legislature to authorize judicial proceedings to be taken for the condemnation of the nets in question, and their sale or destruction by process of law. Congress has assumed this power in a large number of cases, by authorizing the condemnation

of property which has been made use of for the purpose of defrauding the revenue. Examples of this are vessels illegally registered or owned, or employed in smuggling or other illegal traffic; distilleries or breweries illegally carried on or operated, and buildings standing upon or near the boundary line between the United States and another country, and used as depots for smuggling goods. In all these cases, however, the forfeiture was decreed by judicial proceeding. But where the property is of little value, and its use for the illegal purpose is clear, the legislature may declare it to be a nuisance, and subject to summary abatement. Instances of this are the power to kill diseased cattle; to pull down houses in the path of conflagrations; the destruction of decayed fruit or unwholesome meats, or infected clothing, obscene books or pictures, or instruments which can only be used for illegal purposes. While the legislature has no right arbitrarily to declare that to be a nuisance which is clearly not so, a good deal must be left to its discretion in that regard, and if the object to be accomplished is conducive to the public interests, it may exercise a large liberty of choice in the means employed. *Newark Railway* vs. *Hunt, 50 N. J. Law, 308; Blasier* vs. *Miller, 10 Hun., 435; Mouse's Case, 12 Rep., 63; Stone* vs. *New York, 25 Wend., 157, 173; Am. Print Works* vs. *Lawrence, 21 N. J. Law, 248; 23 N. J. Law, 590.*

"It is not easy to draw the line between cases where property illegally used may be destroyed summarily and where judicial proceedings are necessary for its condemnation. If the property were of great value, as, for instance, if it were a vessel employed for smuggling, or other illegal purposes, it would be putting a dangerous power

in the hands of a custom officer to permit him to sell or destroy it as a public nuisance and the owner would have good reason to complain of such act, as depriving him of his property without due process of law. But where the property is of trifling value, and its destruction is necessary to effect the object of a certain statute, we think it is within the power of the legislature to order its summary abatement. For instance, if the legislature should prohibit the killing of fish by explosive shells, and should order the cartridges so used to be destroyed, it would seem like belittling the dignity of the judiciary to require such destruction to be preceded by a solemn condemnation in a court of justice. The same remark might be made of the cards, chips, and dice of a gambling room.

"*The value of the nets in question was but $15 apiece. The cost of condemning one, (and the use of one is illegal as the use of a dozen), by judicial proceedings, would largely exceed the value of the net, and doubtless the State would, in many cases, be deterred from executing the law by the expense.* They could only be removed from the water with difficulty, and were liable to injury in the process of removal. The object of the law is undoubtedly a beneficent one, and the State ought not to be hampered in its enforcement by the application of constitutional provisions which are intended for the protection of substantial rights of property. It is evident that the efficacy of this statute would be very seriously impaired by requiring every net illegally used to be carefully taken from the water, carried before a court or magistrate, notice of the seizure to be given by publication, and regular judicial proceedings to be instituted for its condemnation."

In *People v. West, 106 N. Y., 293*, Judge Andrews said, p. 295:

> "It is not a good objection to a statute prohibiting a particular act and making its commission a public offence, that the prohibited act was before the statute lawful or even innocent and without any element of moral turpitude. It is the province of the legislature to determine in the interest of the public what shall be permitted or forbidden, and the statutes contain very many instances of acts prohibited, the criminality of which consist solely in the fact that they are prohibited and not at all in their intrinsic quality."
>
> *John R. Frost* vs. *Ills. 193 Ills. 635.*

In *Train* vs. *Boston Disinfecting Co., 144 Mass., 530*, it is said:

> "The legislature may determine when that which is otherwise property shall cease to be such if kept contrary to law."

In *Gentile* vs. *State 29* IND. *409*, it is said:

> "For the purpose of effectively carrying out the intent of the legislature, it made it a criminal offense for any person to have in his possession either of such nets."

In the case of *Mon Luck* vs. *Sears, 29 Ore., 421, 33 L. R. A., 738*, the possession of opium, which is valuable and harmless when put to proper use, is prohibited by the statute of Oregon, unless it has been obtained on a prescription of a physician or pharmacist, and that statute was sustained.

In the case of *Lawton* vs. *Steele*, just referred to, the value of the nets was alleged to be $525. In this

ase, the gun has not been of sufficient value to even ggest the amount.

The plaintiff in error argues that upon the passage this Act, vast sums of money in the aggregate be- me subject to confiscation.

If this be true, of itself without more it justifies the assage of this Act of Assembly, because it shows that reigners were in possession of thousands of guns and fles in the State of Pennsylvania, without any other ason or reasonable use therefor than hunting. Cer- inly so many guns could not be needed merely for efense.

But the plaintiff in error is not concerned with the ffect of this Act of Assembly upon any except him- lf and the case of *Lawton* vs. *Steele*, supra, goes to he extent of holding that, even if this Act of Assembly ad provided for the confiscation of his gun without he cost of condemning it, it would have been a proper xercise of the police power.

As far back as *Smith* vs. *the State of Maryland, 18 Howard, 71*, decided in 1855, this court has sustained he seizure and confiscation of property put to illegal se. In that case, the statute of Maryland made it un- wful to take or catch oysters with a scoop or drag, r any other instruments, other than tongs and rakes, nd provided further:

> "And all persons whatever are hereby for- bid the use of such instruments in taking or catching oysters in the waters of this State, on pain of forfeiting to the State the boat or vessel employed for the purpose, together with her pa- pers, furniture, tackle, and apparel, and all things on board the same."

After discussing the question, this Court came to

the conclusion that the State of Maryland had power to enact this law.

Surely, even if the vessel itself could not be considered harmless in itself, when used in violation of the law, the furniture, and particularly the apparel, on it would not come under such ban.

Upon this subject it is further said in *Lawton* vs. *Steele*, supra, (p. 142):

> "It is said, however, that the nets are not in themselves a nuisance, but are perfectly lawful acts of manufacture, and are ordinarily used for a lawful purpose. This is, however, by no means a conclusive answer. Many articles, such, for instance, as cards, dice, and other articles used for gambling purposes, are perfectly harmless in themselves, but may become nuisances by being put to an illegal use, and in such cases fall within the ban of the law and may be summarily destroyed. It is true that this rule does not always follow from the illegal use of a harmless article. A house may not be torn down because it is put to an illegal use, since it may be as readily used for a lawful purpose, *(Ely* vs. *Supervisors*, 36 N. Y. 297,) but where minor articles of personal property are devoted to such use the fact that they may be used for a lawful purpose would not deprive the legislature of the power to destroy them. *The power of the legislature to declare that which is perfectly innocent in itself to be unlawful is beyond question, (People* vs. *West*, 106 N. Y. 293), *and in such case the legislature may annex to the prohibited act all the incidents of a criminal offence, including the destruction of property denounced by it as a public nuisance.*"

In *State* vs. *Lewis, (Ind.), 20 L. R. A., 52*, the statute declared it "a misdemeanor for any person to

have in his possession any gill-net or seine, except a minnow net * * * * * and except for use in Lake Michigan," and provided for conviction for having a net in possession for any other purpose, and the Court said:

> It was evidently deemed by the legislature improper to allow fish to be entrapped and taken from the waters of the state except such as are excluded from the provisions of the act by means of a gill net or seine during any season of the year, and that it was for the public good to prohibit the catching of fish by means of the gill net or seine *and for the purpose of effectually carrying out the intent of the legislature it made it a criminal offense for any person to have in his possession either of such nets, except he have the same for the purpose of use in waters named in the statute, and in which the use of the same were permitted, and we think the statute a valid enactment, and not within any constitutional inhibition.* * * *"*

In this case the Court goes to the extent of saying that it is a valid exercise of the police power to permit the owning of a net, harmless in itself, for one purpose only. If the legislature can limit the purpose for which harmless property can be owned, it may certainly prohibit the owning of a kind of property by a certain class, the ownership of which tends and tempts to violations of law.

In *State* vs. *Robbins, (Ind.), 8 L. R. A., 438,* the statute of that state making gaming devices seized by the sheriff subject to the order of the Court was sustained and the Court, in discussing the question used language, the converse of which sustains the contention

of the Commonwealth of Pennsylvania in this case. It said:

> "In many instances property may or may not exist in a thing according to the use to which it is or may be applied, or the purpose for which it is kept or exhibited, or the intrinsic value of the materials out of which it is constructed. Gaming apparatus may be made of valuable material, capable in some other form of being applied to useful and lawful purposes, or it may be used for innocent and harmless amusement in the form in which it exists. It cannot always be determined by inspection, or disclosed as matter of law, that articles used for the illegal and immoral purpose of gaming may not also be used for innocent and lawful purposes, or that in honest hands they may not constitute lawful merchandise. Unless, therefore, articles seized are of such a character that the law will not recognize them as property, entitled as such to its protection, under any circumstances, *they cannot be summarily destroyed without affording the owner an opportunity to be heard upon the subject of their lawful use,* and to show whether or not the articles are intrinsically useful or valuable for any other purpose than gambling, or whether their only recognized value and customary use is as implements for gaming."

McConnell vs. *McKillip, 71 Neb. 712, 65 L. R. A., 610,* cited by plaintiff in error, does not sustain his argument in this case. The extent to which that case goes is that:

> "Under the police power of the State, a legislature has power to declare property which may be used only for an unlawful purpose to be a public nuisance, and authorize the same to be abated

summarily by public officers; *but if property of a nature innocent in itself and susceptible of a beneficial use, has been used for an unlawful purpose, a statutory provision subjecting it to summary forfeiture to the State as a penalty or punishment for the wrongful use, without affording the owner thereof opportunity for a hearing, deprives him of his property without due process of law.*"

Our case is distinguishable from the two cases last cited.

The statute of Pennsylvania does not subject the gun to summary forfeiture, and does not subject it to any forfeiture whatever until after conviction, and then only because the forfeiture is a part of the sentence.

To the same effect is *Woods* vs. *Cottrell, 65 L. R. A., 616.*

It results from these authorities that the Plaintiff in Error does not need a gun or rifle for protection or defense, and a gun or rifle not being the natural weapon for that purpose and being the natural weapon for hunting, the intention of a foreigner to use it for killing game may be inferred from its possession. Therefore, possession may be forbidden in the exercise of the police power.

IS THE ACT UNCONSTITUTIONAL BECAUSE IT AFFECTS PROPERTY IN POSSESSION AT THE TIME OF ITS PASSAGE?

The plaintiff in error suggests that the Act violates the Constitution of the United States because it made his property liable to seizure and confiscation immediately upon the passage of the Act.

The answer to this proposition is:

1. That there is no evidence that the gun was owned by the plaintiff at the time of the passage of the Act.

2. That if it were, there is no offense against the Constitution in that regard.

An Act of Assembly passed in the exercise of the police power is not invalid, even though it lessens or destroys the value of property upon which it operates.

In *Fertilizing Company* vs. *Hyde Park, 97 U. S., 659;* the ordinance of the borough prohibiting the transfer, carrying, hauling or conveying of any offal, dead animals, and other offensive or unwholesome matter or material into or through the village of Hyde Park was sustained as against the defendant, although it had established its chemical and fertilizing works in what was then a swamp, and had operated the works continually for a term of fifty years, the borough of Hyde Park being built around it. And yet this ordinance, practically destroying the established plant and business of the plaintiff, was sustained as a proper exercise of the police power and not depriving the plaintiff of his property without due process of law.

In *Mugler* vs. *Kansas, 123 U. S. 623,* the prohibitory statute of the State of Kansas was sustained, although its enforcement destroyed vast sums of money invested in intoxicating liquors at the time of its passage and practically destroyed the brewery of the plaintiff erected prior to the passage of the law.

In *Kidd* vs. *Pearson, 128 U. S. p. 1,* the prohibition law of Iowa, having the same effect, was sustained as a proper exercise of the police power, even though it destroyed the value of the prohibited property which

had been lawfully purchased before the enactment of the law.

In *Powell* vs. *Commonwealth, 127 U. S. 678,* the Oleomargarine Law of the State of Pennsylvania was sustained, although it operated to prohibit the sale of all oleo-margarine in the State at the time of its passage.

In *California Reduction Company* vs. *Sanitary Reduction Works, 199 U. S. 306,* an ordinance of the city of San Francisco was sustained, which required the cremation of garbage and refuse at a designated place, although the garbage and refuse had elements of value.

It seems, therefore, no longer an open question that the police power of the State extends even to the destruction of property, where exercise of that power is in the interest of the public welfare.

It is, therefore, submitted that the provision of the Act forbidding aliens owning shotguns and rifles has a real and substantial relation to the purpose and object of the Act, viz., the preservation of game within the Commonwealth of Pennsylvania, and the imposition of the penalty provided by the Act, after hearing, is not a deprivation of property without due process of law.

II.

THIS ACT IS NOT IN VIOLATION OF THE CONSTITUTIONAL PROVISION FOR THE EQUAL PROTECTION OF THE LAWS.

This Act of Assembly is attacked because it denies to aliens within the jurisdiction of Pennsylvania the equal protection of the law. The reason for this attack is that the aliens are put in a class prohibited from

owning guns or rifles, to the end that the protection of game may be more effectively afforded.

This proposition involves the right of the State to classify for the purpose of exercising the police power.

A State has the right to classify its subjects for the purpose of exercising the police power, and if the classification is based upon some difference which bears a just and proper relation to the attempted classification, and is not an arbitrary selection, it does not deny equal protection of law.

In *Louisville & Nashville R. R. Co.* vs. *Melton, 218 U. S., 36,* the present Chief Justice White, delivering the opinion of the Supreme Court of the United States, had this to say about the equal protection of the law clause in the Fourteenth Amendment:

> "That the Fourteenth Amendment was not intended to and does not strip the States of the power to exert their lawful police authority is settled, and requires no reference to authorities. And it is equally settled—as we shall hereafter take occasion to show—as the essential result of the elementary doctrine that the equal protection of the law clause does not restrain the normal exercise of governmental power, but only abuse in the exertion of such authority, therefore, that clause is not offended against simply because as the result of the exercise of the power to classify some inequality may be occasioned. That is to say, as the power to classify is not taken away by the operation of the equal protection of the law clause, a wide scope of legislative discretion may be exerted in classifying without conflicting with the constitutional prohibition.
>
> It is beyond doubt foreclosed that the Indiana

statute does not offend against the equal protection clause of the Fourteenth Amendment, because it subjects railroad employes to a different rule as to the doctrine of fellow servant from that which prevails as to other employments in that State. * * * But while conceding this the argument is that classification of railroad employes for the purpose of the doctrine of fellow-servant can only consistently with equality and uniformity embrace such employes when exposed to dangers peculiarly resulting from the operation of a railroad, thus affording ground for distinguishing them for the purpose of classification from co-employes not subject to like hazards or employes engaged in other occupations. * * * *

The idea evidently intended to be expressed by the argument is, that although, speaking in a general sense, it be true that the hazards arising from the operation of railroads are such that a classification of railroad employes is justified, yet as in operating railroads some employes are subject to risks peculiar to such operation and others to risks which, however serious they may be, are not in the proper sense risks arising from the fact that the employes are engaged in railroad work, the legislative authority in classifying may not confound the two by considering in a general sense the nature and character of the work performed by railroad employes collectively considered, but must consider and separately provide for the distinctions occasioned by the varying nature and character of the duties which railroad operatives may be called upon to discharge. In other words, reduced to its ultimate analysis the contention comes to this, that by the operation of the equal protection clause of the

Fourteenth Amendment, the States are prohibited from exerting their legitimate police powers upon grounds of the generic distinction obtaining between persons and things, however apparent such distinction may be, but on the contrary, must legislate upon the basis of a minute consideration of the distinction which may arise from accidental circumstances as to the persons and things coming within the general class provided for. When the proposition is thus accurately fixed it necessarily results that in effect it denies the existence of the power to classify, and hence must rest upon the assumption that the equal protection clause of the Fourteenth Amendment has a scope and effect upon the lawful authority of the States contrary to the doctrine maintained by this court without deviation. This follows since the necessary consequence of the argument is to virtually challenge the legislative power to classify and the numerous decisions upholding that authority. To this destructive end it is apparent the argument must come, since it assumes that however completely a classification may be justified by general considerations, such classification may not be made if inequalities be detected as to some persons embraced within the general class by a critical analysis of the relation of the persons or things otherwise embraced within the general class. A brief reference to some of the cases dealing with the power of a State to classify will make the error of the contention apparent.

In *Magoun* vs. *Illinois Trust & Savings Bank, 170 U. S. 294, 296,* while declaring that the power of a State to distinguish, select and classify objects of legislation was of course not without limitation, it was said, '*necessarily this power must*

have a wide range of discretion.' After referring to various decisions of this court, it was observed:

'There is therefore no precise application of the rule of reasonableness of classification, and the rule of equality permits many practical inequalities. And necessarily so. In a classification for governmental purposes there cannot be an exact exclusion or inclusion of persons and things.'

Again, considering the subject in *Orient Ins. Co.* vs. *Daggs, 172 U. S. 557,* it was reiterated that the legislature of a State has necessarily a wide range of discretion in distinguishing, selecting and classifying, and it was declared that it was sufficient to satisfy the demand of the Constitution if a classification was practical and not palpably arbitrary.

In *Minnesota Iron Co.* vs. *Kline, 199 U. S. 593,* a statute of Minnesota, providing that the liability of railroad companies for damages to employes should not be diminished by reason of accident so occurring through the negligence of fellow servants, was held not to discriminate against any class of railroads, or to deny the equal protection of the laws because of a proviso which excepted employes engaged in construction of new and unopened railroads. In the course of the opinion the court said (p. 598): 'The whole case is put on the proviso, and the argument with regard to that is merely one of the many attempts to impart an overmathematical nicety to the prohibitions of the Fourteenth Amendment.' These principles were again applied in *Martin* vs. *Pittsburg &c. R. R. Co., 203 U. S. 284,* and the doctrines were also fully considered and reiterated at this term in *Southwestern Oil Co.* vs. *Texas, 217 U. S. 114.*"

The above opinion of the present great Chief Justice of the Supreme Court of the United States is quoted at such length because it defines with extraordinary clearness the scope, operation and effect, of the equal protection of the law clause of the Fourteenth Amendment, with relation to the exercise of the power of a State legislature to classify objects of legislation. It clearly confirms the principle of constitutional law which rests upon common sense, namely, that

> "There is no precise application of the rule of reasonableness of classification, and the rule of equality permits many practical inequalities and necessarily so. In a classification for governmental purposes there cannot be an exact exclusion or inclusion of persons and things."

It recognizes that "an overmathematical nicety" is not to be imparted to the prohibitions of the Fourteenth Amendment; that

> "The power of a State to distinguish, select and classify objects of legislation 'necessarily must have a wide range of discretion.'"

The above rules relating to the legislative power to classify are, in themselves, but specific applications of a general principle pervading the whole constitutional law especially with regard to the police power, which, as stated by the Supreme Court of the United States in *Lawton* vs. *Steele, 152 U. S., 136,* is that

> "The State may interfere wherever the public interests demand it, and in this respect a large discretion is necessarily vested in the legislature to determine not only what the interests of the public require, *but what measures are necessary for the protection of such interests.*"

Reference may also be made to the following relevant and important decisions:

In *Mager* vs. *Grumo, 8 How. 490,* Chief Justice Taney discussing a law which imposed a tax of 10% upon the inheritance of persons who were not citizens of the State, said:

> "We can see no objection to such a tax, whether imposed on citizens or aliens alike, or upon the latter, exclusively."

Magoun vs. *Trust Co., 170 U. S. 383.*
Barbier vs. *Connolly, 113 U. S. 127.*
Missouri vs. *Lewis, 101 U. S. 22.*
Tobacco Society vs. *Brumback, 128 Ky. 141.*
St. Louis Ry. Co. vs. *State, 86 Ark. 518.*
Badenock vs. *Chicago, 222 Ill. 71.*
Commonwealth vs. *Clark, 195 Pa. 634.*

In the much cited case of *Trageser* vs. *Gray, 73 Md. 250,* the Court of Appeals of Maryland sustained the Act of 1890, which limited the right to license to sell intoxicating liquors by retail "only to citizens of the United States of temperate habits and good moral character," as a valid exercise of the police power.

The Court said, speaking of the power of the Legislature, (p. 253),

> "Their power over the whole subject under the Constitution of this State cannot at this day be questioned. They may prohibit the sale of spiritous liquors entirely if they see fit to do so; or they may restrict it in any manner which their discretion may dictate. No one can claim as a right the power to sell; either at any time, or at any place, or in any quantity. If he is allowed to sell under any circumstances, it is simply by the

free permission of the Legislature, and on such terms as it sees fit to impose."

And on Page 254:

"It therefore seemed wise to the Legislature to confer it only on those who, being natives of the country, might reasonably be supposed to have a regard for its welfare; or who, not being natives, has, as required by the naturalization law, proven by credible testimony before a Court of Justice, that they were attached to the principles of the Constitution of the United States, and were well disposed to their good order and happiness. It was certainly the function of the law-making department to exercise its judgment on this question, and this Court has no right to criticize its conclusion. We do not think that this law is, in any manner, in conflict with the Constitution of the United States."

And on Page 259:

"The statute now before us oppresses no one, and was intended to oppress no one. It does not take from any man a solitary right, privilege or immunity. It subjects no one to penalties for its violation which are not imposed equally on all offenders. It does not, it is true, make an equal partition of the privilege of liquor selling among all classes of persons. But there is no warrant for supposing that legislative control over this traffic must conform to any such standard. It is not crippled by any such restraint. It overrides all private interests and embraces all means which are necessary and proper to protect the public from evils connected with the subject."

In *Commonwealth* vs. *Hana*, *11 L. R. A. (N. S.), 799*, the Supreme Judicial Court of Massachusetts, upon full consideration, adjudged that the State in the exercise of its police power could lawfully restrict the granting of a peddler's license to citizens of the United States. In that case it appeared that, under Section 19 of the Massachusetts Statute, no person can obtain a peddler's license unless he is, or has declared his intention to become, a citizen of the United States, and the act made it unlawful to carry on the business of a peddler of goods without the license required. It was urged by an alien that this requirement of citizenship was in violation of the equal protection of the laws clause of the Fourteenth Amendment of the Federal Constitution above mentioned. After noting that under the decision in *Yick Wo* vs. *Hopkins*, *118 U. S., 356*, aliens, as well as citizens of the United States, are within the protection of said provision of the Fourteenth Amendment, as being "persons" that are within the jurisdiction of the State, the court said, per Chief Justice Knowlton:

> "*There is, however, an important question whether the legislature in the exercise of the police power could discover a reason for withholding the peddlers' license from aliens.* The business of peddling furnishes such opportunities for the practice of fraud, that it is a proper subject for legislative regulation. That such regulation has been practiced from early times, both in Europe and America, is shown at length by Mr. Justice Gray, in *Emert* vs. *Mo.*, *156 U. S., 296*. The requirement of Revised Laws, Chapter 65, Section 19, that before receiving a license the applicant shall file a certificate from the Mayor of the City or the majority of the select men of the town, that to the best of his or their knowledge and belief he is of good repute for morals and integrity, is

a reasonable regulation for the protection of the public. If, in the same interest the legislature deems it important that licenses shall be granted only to citizens of the United States, or to those who have declared their intention to become citizens, it can hardly be said that they have exceeded their constitutional right in passing a law to that effect.

Upon a similar question in reference to the granting of licenses to sell intoxicating liquors, decided in *Trageser* vs. *Gray, 73 Md., 250,* the court used this language: 'It was thought proper to confine the license to citizens of the United States of temperate habits and good moral character. The privilege is very liable to be abused, and abuses would produce great public detriment. *It therefore seemed wise to the legislature to confer it only on those who, being natives of the country, might reasonably be supposed to have a regard for its welfare; or who, not being natives, had, as required by the naturalization law, proven by credible testimony before a court of justice that they were attached to the principles of the Constitution of the United States and were well disposed to their good order and happiness. It was certainly the function of the lawmaking department to exercise its judgment on this question, and this court has no right to criticise its conclusion.*' The opinion then goes on to say that the right so to legislate is within the police power reserved to the states, and, after a full discussion, to declare that it is not at variance with the 14th amendment to the Constitution of the United States. *The same reasoning is equally applicable to the granting of licenses to hawkers and peddlers. Indeed, the nature of their business is such that their possession of a domicile and citizenship in*

*this country might be important to those seeking remedies for wrong done in their business. * * * We are of opinion that the legislature in the exercise of the police power, might make this requirement as to the qualifications of applicants for a peddler's license."*

In the *Slaughter House Case, 16 Wall., 36,* it was held that in the exercise of the police power the State of Louisiana could lawfully grant to a single corporation for twenty-five years the exclusive privilege of maintaining slaughter houses in a district or country containing more than 1100 square miles and including the city of New Orleans.

In *Kidd* vs. *Pearson, 128 U. S., 1,* the statute of Iowa, which prohibited the manufacture and sale of intoxicating liquors, had this provision:

"Any citizens of the State except hotel keepers, keepers of saloons, eating houses, grocery keepers and confectioners is hereby permitted, within the county of his residence, to manufacture, or buy and sell, intoxicating liquors for mechanical, medicinal, culinary and sacramental purposes only, provided he shall first obtain permission from the Board of Supervisors of the county in which such business is conducted."

It will be noticed that the privilege granted in this statute was confined to citizens of the State and that, moreover, there was a discrimination against five separate classes of these citizens. But the valid exercise of the police power does not depend upon any question of discrimination for or against any particular person or classes of persons. It is confided to the wisdom of the Legislature to make such application of it as the public welfare may require and in this case Mr. Justice

Lamar, deciding the statute to be valid exercise of the police power, concludes with this language: (p. 26)

> "The application of the principles above announced to the case under consideration leads to a conclusion against the contention of the plaintiff in error. The police power of a State is as broad and plenary as its taxing power; and property within the State is subject to the operations of the former so long as it is within the regulating restrictions of the latter."

As was well said by Judge Orlady in this case, (Transcript of Record, p. 19):

> "We legislate primarily for our own citizens in granting the special privileges that are independent of our inherent rights. The alien is prohibited from doing many things to which a native born or a naturalized citizen is entitled. He cannot exercise any political rights whatever, nor be compelled to fill any elective or appointive office; he is not qualified to serve as a juror; or to receive a license to sell liquor, hawk or peddle. A non-resident debtor is not entitled to the benefit of our $300 exemption law. Each state has its own exemption laws for the benefit of its own citizens: Callom's App.

And as was also well said by Judge Evans, in the Court of Quarter Sessions (Transcript of Record, p. 7):

> "* * * * but if it be contended that the clause has fixed an absolute equality between the alien and the citizen, then all the laws of the various states regulating inheritance of property by aliens, taxing gifts and legacies to them, closing to them certain fields of employment such as the sale of

spiritous, vinous and malt liquors are all unconstitutional. We do not think that that was the intendment of that clause of the amendment. The right to hunt game in Pennsylvania is a privilege given by the state and not an inherent right in the inhabitants of the State."

In the case of *McCready* vs. *Virginia, 94 U. S., 391,* the statute of Virginia, which prohibited the citizens of other states from planting oysters in Ware River, a stream in that State, where the tide ebbs and flows, when its own citizens have that privilege, was attacked as a violation of the Constitution of the United States. Mr. Chief Justice Waite said:

"The planting of oysters in the soil covered by water owned in common by the people of the State is not different in principle from that of planting corn upon dry land held in the same way. Both are for the purposes of cultivation and profit; and if the State, in the regulation of its public domain, can grant to its own citizens the exclusive use of dry lands, we see no reason why it may not do the same thing in respect to such as are covered by water. And as all concede that a State may grant to one of its citizens the exclusive use of a part of the common property, the conclusion would seem to follow, that it might by appropriate legislation confine the use of the whole to its own people alone."

"We think we may safely hold that the citizens of one state are not invested by this clause of the Constitution (14 Amend). with any interest in the common property of the citizens of another state. If Virginia had by law provided for the sale of its once vast public domain and a division of the proceeds among its own people, no

one, we venture to say, would contend that the citizens of other states had a constitutional right to the enjoyment of this privilege of Virginia citizenship. Neither if, instead of selling, the state had appropriated the same property to be used as a common by its people for the purpose of agriculture, could the citizens of other states avail themselves of such a privilege. And the reason is obvious: The right thus granted is not a privilege or immunity of general but special citizenship. It does not "belong of right to the citizens of all free governments," but only to the citizens of Virginia, on account of the peculiar circumstances in which they are placed. They, and they alone, owned the property to be sold or used, and they alone had the power to dispose of it as they saw fit. They owned it, not by virtue of citizenship merely, but of citizenship and domicile united; that is to say, by virtue of a citizenship confined to that particular locality.

And as all concede that a state may grant to one of its citizens the exclusive use of a part of the common property, the conclusion would seem to follow, that it might by appropriate legislation confine the use of the whole to its own people alone."

To sustain his argument the plaintiff in error cites the case of *Plessy* vs. *Ferguson, 163 U. S., 537*, and yet this case sustains the statute of Louisiana, requiring railway companies carrying passengers in their coaches in that State to provide equal but separate accommodations for white and colored races and providing that no person should be permitted to occupy seats in coaches other than the ones assigned to them, on account of the race they belong to, did not offend against

the Fourteenth Amendment of the Constitution of the United States.

In the other principal case cited in support of the argument of the plaintiff in error, *Yick Wo* vs. *Hopkins, 118 U. S., 356,* the distinction is pointed out. In that case the ordinance of the city of San Francisco provided that it should be unlawful to operate a laundry within the corporate limits without having first obtained a license, and the statute was so administered that licenses were granted to all persons except Chinese residents, and were refused to Chinese residents, although the character of the building and conditions were precisely similar to those granted to other persons. The statute did not pretend to regulate the business of conducting laundries, except as to the granting of licenses, and the Supreme Court, while declaring the law fair on its face, restrained the illegal administration of it, declaring (pp. 373, 374):

> "Though the law itself be fair on its face and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution. This principle of interpretation has been sanctioned by this court in *Henderson* vs. *Mayor of New York,* 92 U. S., 259; *Chy Lung* vs. *Freeman,* 92 U. S., 275; *Ex parte Virginia,* 100 U. S. 339; *Neal* vs. *Delaware,* 103 U. S., 370; and *Soon Hing* vs. *Crowley,* 113 U. S., 703.
>
> "The present cases, as shown by the facts disclosed in the record, are within this class. It appears that both petitioners have complied with every requisite, deemed by the law or by the public officers charged with its administration, necessary

for the protection of neighboring property from fire, or as a precaution against injury to the public health. No reason whatever, except the will of the supervisors, is assigned why they should not be permitted to carry on, in the accustomed manner, their harmless and useful occupation, on which they depend for a livelihood. And while this consent of the supervisors is withheld from them and from two hundred others who have also petitioned, all of whom happen to be Chinese subjects, eighty others, not Chinese subjects, are permitted to carry on the same business under similar conditions. The fact of this discrimination is admitted. No reason for it is shown, and the conclusion cannot be resisted, that no reason for it exists except hostility to the race and nationality to which the petitioners belong, and which in the eye of the law is not justified. The discrimination is, therefore, illegal, and the public administration which enforces it is a denial of the equal protection of the laws and a violation of the Fourteenth Amendment of the Constitution. The imprisonment of the petitioners is, therefore, illegal, and they must be discharged."

It is clear from the above quotation that the cases cited by Plaintiff in Error are not against the position of the Defendant in Error.

The Plaintiff in Error is an alien, one of a very large class whose residence may be uncertain, who pays no taxes and has no share in the public burden. He has all of the rights which are guaranteed to individuals in the same class, but he cannot complain if he does not have all the rights of the citizen. As long as he is not discriminated against as to other persons in his class, he can have no valid complaint against the operation of this law.

RESIDENT AND NON-RESIDENT ALIENS.

It is intimated that there is a further discrimination against resident aliens as distinguished from non-resident aliens. This Act of Assembly operates upon resident aliens. The mischief which the Legislature found it necessary to correct was committed by them.

Hence the classification was an obviously good and proper one. That classification may be properly based upon the "degree of evil" designed to be remedied, has been repeatedly declared and upheld by this court.

Heath vs. *Worst., 207 U. S., 338.*
Engel vs. *O'Malley, 219 U. S., 128.*
Hatch vs. Reardon, 204 U. S., 152.

In *Chicago Dock Co.* vs. *Fraley, 228 U. S., 680,* decided May 26th, 1913, Mr. Justice McKenna, delivering the opinion of this Court, speaking of the classification based upon the "degree of evil," said (686):

> "That danger is the test may be conceded but there may be degrees of it and a difference in degree may justify classification. *Mutual Loan Co.* v. *Martel, 222 U. S., 225, 236.* Who is to judge of the danger, whether absolutely considered or comparatively considered? Is it a matter of belief or proof? If of belief, we should be very reluctant to oppose ours to that of the legislature of the State, informed no doubt by experience of conditions and fortified by presumptions of legality and confirmed, besides, by the opinion of the Supreme Court of the State. *Laurel Hill Cemetery* v. *San Francisco, 216 U. S., 358, 365; Adams* v. *City of Milwaukee, ante, p. 572.* If of proof, there is none in the record. There are assertions by counsel, and considering alone the openings nec-

> essary for hoisting machinery and the openings for stairs and other openings, an employe or materials can be imagined as falling through one of them with the same ease as he or the materials can through the others. But other things must be taken into account. The setting of the openings must be considered, the varying relations of the employes to them, and other circumstances. The legislation cannot be judged by abstract or theoretical comparisons."

As to the time of residence, the Legislature fixed ten days as necessary to bring the alien within the class made subject to the provisions of this Act. This is a reasonable period and, hence, a reasonable classification in this regard. Analogous cases upon this proposition are to be found in the books.

In the case of *State* vs. *Niles, 78 Vt., 262, 112 Am. St. Rep., 917*, a statute, providing for the granting of hunting licenses to non-residents and discriminating in favor of non-residents as to the number of deer which could be killed in one season, was sustained as not being a violation of the Fourteenth Amendment to the Constitution of the United States, and in that case it is said:

> "The ownership of game being in the people of the State, the Legislature, as the representative of the people, may withhold or grant to individuals the right to hunt or kill game, or qualify and restrain it, as, in the opinion of its members, will best serve the public welfare."

If a State can regulate the killing of game and regulate the means by which it may be killed, in order to prevent [illegible] killing, it can deprive its residents, natives or aliens, of the right to own shotguns and rifles for that purpose.

A resident of the State has no standing to complain if such regulation is not imposed upon a non-resident. In *Missouri* vs. *Lewis, 101 U. S. 22,* it is said, p. 31,

> "If every person residing or being in either portion of the state should be accorded the equal protection of the laws prevailing there, he could not justly complain of a violation of the clause referred to (14th Amend). For, as before said, it has respect to persons and classes of persons. It means that no person or class of persons shall be denied the same protection of the laws which is enjoyed by other persons or other classes in the same place and under like circumstances.
>
> The Fourteenth Amendment does not profess to secure to all persons in the United States the benefit of the same laws and remedies."

In *Corfield* vs. *Coryell, 4 Washington C. C., 371,* the constitutionality of an act which made it unlawful for any person not an inhabitant and resident to gather oysters was considered and sustained. Mr. Justice Washington said, p. 330:

> "But we cannot accede to the proposition that under this provision of the Constitution the citizens of the several states are permitted to participate in all *the rights* which belong exclusively to the citizens of any other particular state, merely on the ground that they are enjoyed by those citizens, much less, that in regulating the use of the common property of the citizens of such state, the legislature is bound to extend to all the citizens of all other states the same advantages as are secured to their own citizens.
>
> The oyster beds belonging to a state may be abundantly sufficient for the use of the citizens of that state, but might be totally exhausted and de-

> stroyed if the legislature could not so regulate the use of them so as to exclude citizens of other states from taking them, except under such limitations and restrictions as the laws may prescribe."
>
> *Allen vs. Wykoff, 48 N. J. L. 90.*

It, therefore, follows that the protection of game being a proper subject for the exercise of the police power; the State having authority to regulate the method and the means by which game may be killed; it has the power to classify resident aliens in one class with reference to such regulation; and the Act of Assembly of 1909 operating uniformly on all resident aliens, the Legislature having defined what shall constitute residents; such Act of Assembly under the decisions above referred to, cannot be considered a denial of the equal protection of the law.

III.

THIS ACT OF ASSEMBLY IS NOT IN VIOLATION OF THE TREATY WITH ITALY.

The treaty so far as it affects this case is printed in the brief for the Plaintiff in Error. By Article II of that treaty:

> "The citizens of each of the high contracting parties shall have liberty to travel in the States and territories of the other, to carry on trade, wholesale and retail, to hire and occupy houses and warehouses, to employ agents of their choice, and generally to do anything incident to or necessary for trade upon the same terms as the natives

of the country, submitting themselves to the laws there established."

Article III provides:

> "The citizens of each of the high contracting parties shall receive, in the States and territories of the other, the most constant protection and security for their persons and property, and shall enjoy in this respect the same rights and privileges as are or shall be granted to the natives, on their submitting themselves to the conditions imposed upon the natives."

Under the terms of Article XXIV of the Treaty the provisions for the convention of friendship, commerce and extradition between the United States and the Swiss Confederation, proclaimed November 9, 1885, 11 Statutes at large, page 587, are available to Italian subjects in America.

Article III seems to the Defendant in Error to be the important provision in the controversy.

The question as to whether the Plaintiff in Error has been deprived of the right to manufacture or trade in shot-guns or rifles is not before the Court.

It is argued that the Act violates Article II of the treaty, because it not only prevents the possession of fire arms by aliens but would prevent their manufacture or trading in them, and would thus exclude aliens "from what might prove very lucrative vocations of trade and commerce." (Brief for Plaintiff in Error, p. 28).

We confidently submit that for the reason that the statute is a penal statute, and therefore to be construed strictly, and for the further reason that it was enacted in the light and presumed recognition of Article II of

the treaty, that the said statute cannot, as plaintiff in error contends, be construed as intended to prevent the manufacture and trading in fire arms by aliens.

But, be this as it may, the question as to whether the Plaintiff in Error has been deprived of the right to manufacture or trade in shot guns or rifles is not before the Court.

For if it be conceded that the Plaintiff in Error is correct in assuming that the statute should be construed to prevent manufacturing or trading in fire arms by aliens, a construction which, for reasons just given, we respectfully submit, cannot be made, yet the Plaintiff in Error is not in a position to raise this question, because there is no evidence at all that he was manufacturing or trading in fire arms, or that he was excluded from that or any other vocation of trade or commerce. That the statute might cover cases which would make it violative of the treaty is no defense to a person who is not affected by those cases.

In *Yazoo, &c. R. R.* vs. *Jackson Vinegar Co., 226 U. S., 217* (1912), a railroad company claimed a statute was unconstitutional which imposed upon it a penalty for failing to settle claims for damaged goods in shipments within the State in sixty days, arguing that there might be cases in which this would be practically impossible. The particular case, however, did not involve any elements which made it impracticable for the company to have made the settlement within the time fixed by the statute, and the court held that it could not complain of other possibilities, saying, per Mr. Justice Vandevanter:

> "It is not open to the railway company to complain on that score. It has not been penalized for failing to accede to an excessive or extravagant claim, but for failing to make reasonably prompt settlement of a claim which upon due inquiry had been pronounced just in every respect. Of course

the argument to sustain the contention is that if the statute embraces cases such as are supposed, it is void as to them, and if so void is void in toto. But this court must deal with the case in hand, and not with imaginary ones. It suffices, therefore, to hold that, as applied to cases like the present, the statute is valid. How the State court may apply it to other cases and whether its general words may be treated as more or less restrained, and how far parts of it may be sustained if others fail, are matters upon which we need not speculate now."

OPINION OF SUPREME COURT OF PENNSYLVANIA.

It is proper at this point to call attention to the view of Judge Orlady, of the Superior Court, affirmed by the Supreme Court, concerning this treaty.

Judge Orlady said, (Transcript of Record, page 21):

"Is it a reasonable construction to hold that it was intended to clothe unnaturalized foreign-born residents with the same rights, immunities, and advantages as are conferred solely as a privilege on citizens? The whole trend of our decisions is against such an interpretation. The terms of the treaty provide for the protection and security of their persons and property, and in this respect,—to such protection and security,—the enjoyment of the same rights and privileges as are or shall be granted to the natives, on their submitting themselves to the conditions imposed on the natives.

An unnaturalized foreign-born resident cannot comply with the conditions imposed on a native-born or naturalized resident. Article XIV of the federal constitution defines this condition: 'All persons born or naturalized in the United States

and subject to the jurisdiction thereof are citizens of the United States, and of the states wherein they reside.' It would be a perversion of language to hold that the phrase,—the same rights or privileges as are or shall be granted to the natives,—was intended to or could embrace all the regulations affecting our franchise rights; the administration and execution of our laws, the special rights granted as privileges by our government to particular classes of our citizens. Such a construction would render nugatory the qualification for president of the United States as provided by Article II, Section 1, par. 5, of our federal constitution, and other limitations that are made equally explicit in our fundamental law."

His views seemed to be sustained by

Ghio's Estate 157 Cal., 108 Pac., 576.
Fulco vs. *Schuylkill Stone Co., 163 Fed., 124.*
Maiorans vs. *B. & O. R. R. Co., 213 U. S., 268.*

The right of a subject of the King of Italy to possess shot-guns and rifles in the States of the United States is not intended to be secured by the stipulations of the treaty with Italy, any more than the right to have and sell intoxicating liquor would be secured to such subject by the provisions of that treaty, and Plaintiff in Error concedes that the right to sell liquor is not guaranteed by the treaty.

Plaintiff in Error says, on page 30 of his brief that:

"It is not contended that Italian subjects are entitled under the treaty to all the rights and privileges of citizenship. It is recognized that certain privileges as thus noted may be possessed in con-

sequence of citizenship, for example, the right to sell liquor differs materially from the enjoyment of one of the inherent rights of mankind."

Plaintiff in Error is forced to this concession by the decision in *Crowley* vs. *Christensen, 137 U. S., 86,* (1890), which he cites, and wherein it was held (p. 91) that

> "There is no inherent right in a citizen to thus sell intoxicating liquors by retail. This is not a privilege of a citizen of the State or of a citizen of the United States."

In *Bartemeyer* vs. *Iowa, 85 U. S., 1291,* with reference to this "right" the Court had previously held:

> "So far as such a right exists it is not one of the rights growing out of citizenship of the United States."

Therefore, it could not be contended by the Plaintiff in Error, nor has it ever been held by this court, that a subject of a foreign country is entitled to sell intoxicating liquor under the provisions of the equal protection of the laws clause of the Fourteenth Amendment, or of the provisions of a treaty securing personal and property rights and the right to trade. The right to have and sell such liquor is a concession, permission or privilege which may be granted or withheld by the State to either its citizens or alien persons within its jurisdiction alike, without infraction of the provisions of the Fourteenth Amendment, or such provisions as are contained in the treaties invoked by the Plaintiff in Error.

Recognizing this fact, it is, however, contended by our opponent that while it is true, nevertheless the treaty does secure the right to have and to trade in fire

arms, i. e., shot guns and rifles, because that is one
the inherent rights of mankind.

In another part of his brief, page 20, he urges th

> "Shot guns and rifles are articles of prope
> not harmful in themselves, necessary for legitim
> uses, etc."

As much can, with equal truth, be said of intoxicat
liquor. It is, of course, the use made of intoxicating
quor which constitutes the harm and evil which it
within the power of the State to eradicate, and to t
end, it is well settled, the State may absolutely prohi
aliens, e. g., from selling such liquor, by the enactm
of a license law which prohibits the granting of a
cense to them. Likewise, it is the use to which fire ar
may be put, either by citizens or by aliens, which wo
justify and entitle the State to make their possess
and use a franchise. Upon no logical ground,
ground of reason or experience, can a distinction
drawn in this respect between intoxicating liquor
fire arms. If a man has no inherent right, prope
right or otherwise, in intoxicating liquor, when
State declares that he shall have no such right, the
follows that a man has no inherent right to have or
trade in fire arms.

The fact of having fire arms may, in the judgment
the legislature of the State, reflecting the prevail
and preponderant public opinion in the state, be "
tended with danger to the community" as to many s
ject matters within the full police power of the St
—among them the protection of the game supply of
State—and such possession of fire arms may, therefo
under the decision of this court in Crowley *vs.* Ch
tensen, be "entirely prohibited."

Therefore, if, as was held in *Trageser* vs. *Gray*,
Md., 587, and as is conceded by the Plaintiff in Er
the right to sell liquor be not an inherent prope

right, but a mere privilege which the State may grant or withhold to any one, citizen or alien, it follows, for the same reasons which hold the right with respect to intoxicating liquor a mere privilege, that the right to have and manufacture and sell fire arms is a mere privilege of like character.

If this be true, it follows that the Pennsylvania statute complained of interferes with no personal or property right guaranteed by the treaty with Italy, nor by the Fourteenth Amendment of the National Constitution, any more than a statute of like character with respect to intoxicating liquor would infringe such personal or property rights guaranteed by the treaty or by the Fourteenth Amendment to aliens.

Even if a distinction could properly be made between the right to sell liquor and the right to sell or possess fire-arms (i. e. shot-guns and rifles), yet the United States has no power to contract away by a treaty the reserved police power of the several States, essential to their self preservation as sovereign states, to regulate their own internal affairs, since a state without police power cannot exist.

If this were not the law of the Constitution, the treaty making power of the Federal Government might be exerted to such an extent as to destroy the very existence of the separate states of the Union. The police power which was *not* delegated by the States to the Federal Government, under the Constitution, is the power of self defense, self protection and self preservation of the States themselves,—is inalienable and cannot be bartered away.

Thus in the *License Cases, 46 U. S., 5 How., 504,* Mr. Justice Woodbury said:

"How can they (the States) be sovereign within

their respective spheres, without power to regulate all their internal commerce, as well as police, and direct how, when and where it shall be conducted in articles intimately connected either with public morals or public safety or public prosperity."

and Mr. Justice McLean, also said:

"A State regulates its domestic commerce, contracts the transmission of estates, real and personal, and acts upon internal matters which relate to its moral and political welfare. Over these subjects the Federal Government has no power.*** The acknowledged police power of a state extends often to the destruction of property. A nuisance may be abated. Everything prejudicial to the health or morals of a city may be removed."

(Quoted with approval in *Mugler* vs. *Kansas, 123 U. S., 208*).

And in the case of *New York* vs. *Miln, 11 Peters, 102*, we find these words by Mr. Justice Barbour:

"We choose rather to plant ourselves on what we consider impregnable positions. They are these: * * * That all those powers which relate to merely municipal legislation, or what may, perhaps, more properly be called internal police, are not thus surrendered or restrained; and that, consequently, in relation to these, the authority of a state is complete, unqualified and exclusive."

Again in *Leisy* vs. *Hardin, 135 U. S., 100*, this court said:

"Among the powers thus reserved to the several States is what is commonly called the police power—that inhering and necessary power essen-

tial to the very existence of civil society, and the safeguard of the inhabitants of the State against disorder, disease, poverty and crime. 'The police power belonging to the states in virtue of their general sovereignty' said Mr. Justice Story, delivering the judgment of this court, 'extends over all subjects within the territorial limits of the states; and has never been conceded to the United States.' *Prigg* vs. *Pennsylvania, 16 Pet., 539, 625.*"

This inalienability of course, necessarily includes the inalienability of the power to prescribe the appropriate means of making the power effective.

In *Beer Co.* vs. *Mass., 97 Mass., 25,* Mr. Justice Bradley, said, speaking for this court, with regard to the means adopted by the legislature of the State to attain the objects of the police power, that said objects

> "are to be attained and provided for by such appropriate means as the legislative discretion may devise"

and that

> "that discretion can no more be bargained away than the power itself."

Therefore, the police power is retained, notwithstanding the Fourteenth Amendment.

We have seen that neither the due process of law clause, nor the equal protection of the laws clause, of the Fourteenth Amendment to the National Constitution in any wise affects a valid exercise of this police power by the several states. As a measure for protection the food supply of a state, the latter has the full police power to regulate the hunting of its game, of which it is the owner in trust for the whole people of such state. In

the exercise of this power the State of Pennsylvania has, by the statute in question, determined, upon reasonable grounds and from experience, that the prohibition of the possession of shot guns and rifles by aliens is necessary for the adequate protection of said food supply. The prohibition of possession of such shot guns and rifles by aliens is, therefore, due process of law, within the meaning of the Fourteenth Amendment.

Powell vs. *Penna., 127 U. S., 678.*
Silz vs. *Hesterberg, 211 U. S., 31.*
Purity Extract Co. vs. *Lynch, 226 U. S., 192.*
Chicago Dock Co. vs. *Fraley, 228 U. S., 680.*

As was held in *Commonwealth* vs. *Hana, 11 L. R. A., (N. S.) 799,* with respect to similar legislation restricting the right to peddle goods to citizens of the State of Massachusetts, the statute here does not deny the equal protection of the laws to aliens by restricting the prohibitions of the Act to that class of people within the State, for the reason that the provisions of the act in that regard constitute a reasonable exercise of the police power of the State—the classification being based upon reasonable grounds and upon the experience of the State of Pennsylvania "fortified by presumptions of legality and confirmed, besides, by the opinion of the Supreme Court of the State."

The record here discloses no proof by the Plaintiff in Error in the State courts, which would warrant this Court in overturning such presumption of legality and confirmation of validity made by both the Superior and Supreme Courts of the State.

Chicago Dock Co. vs. *Fraley, 228 U. S., 680,* (supra).

Application of Principle to this Statute.

The statute, therefore, violates no limitation of the power of the State imposed by the provisions of the

Fourteenth Amendment to the National Constitution, guaranteeing to all persons within the State due process and the equal protection of the laws. This is for the reason that the statute is a valid and reasonable exercise of the inalienable and non-delegated sovereign police power of the State.

Similar Necessity for Retention of Police Power, Notwithstanding Power of the United States to Make Treaties.

"Laws of the United States, in order to be binding, must be within the legitimate powers vested by the Constitution. Treaties, to be valid, must be made within the scope of the same powers; for there can be no 'authority of the United States,' save what is derived mediately or immediately, and regularly and legitimately, from the Constitution. A treaty, no more than an ordinary statute, can arbitrarily cede away any one right of a State or of any citizen of a state."

License Cases, 46 U. S., 540, 613.

That the Treaty power of the Federal Government is not unlimited is well settled.

In *Geofroy* vs. *Riggs, 133 U. S., 258,* this Court declared that the treaty making power was limited

> "by those restraints which are found in that instrument against the action of the government or of its departments, and those arising from the nature of the government itself and of that of the States. It would not be contended that it extends so far as to authorize what the Constitution forbids, or a change in the character of the government or in that of one of the States, or a cession of any portion of the territory of the latter, without its consent."

To hold that it is within the power of the National Government, by the stipulations of a treaty, to so impair and restrict the exercise of this State police power as to render its exercise for the self preservation of the State wholly abortive and useless, is to deny for all practical purposes the police power itself. Such denial, we submit, would be wholly subversive of that dual system of State and National Government established by the Federal Constitution, since to deprive, by any means, a State of the police power, or the essential means to make such power effective, is to deprive the State of its right to exist as a State of the United States.

No right of the alien, secured to him as against State action by the Fourteenth Amendment to the National Constitution, has been violated by this statute. Under that amendment securing to aliens and citizens alike the fundamental rights of life, liberty and property and the equal protection of the laws, the State may exercise its indispensable police power and may make reasonable classifications in the exercise of that power, which, in many ways, affect these fundamental rights. This police power cannot be bartered away, and therefore, as the Supreme Court of Maryland said, per Bryan, J., in *Trageser* vs. *Gray, 73 Md., 250,*

> "We are unable to conceive that any one, citizen or alien, can acquire rights which would in any way control, impair, impede, limit, or diminish the police power of a State. Such power is original, inherent and exclusive, it has never been surrendered to the general government, and never can be surrendered without imperiling the existence of civil society."

The Federal Government as Marshal C. J. said in *McCulloch* vs. *State of Md., 4 Wheat., 316, 405,* being "acknowledged by all to be of enumerated powers" and

the power to bargain away the police power of the states not being one of the enumerated powers of the National government delegated to it by the people of said states, it follows from the very nature of the police power and of the fundamental dual system of State and National government that it is incompetent for the latter, under the Federal Constitution, to bargain away the police power of the states.

We respectfully submit that the demarcation as between the State police power and the Federal treaty making power in this respect, should properly proceed upon the lines indicated by Albert H. Putney, Dean of the Webster College of Law, (See Case and Comment for October, 1913), viz:

> "The principal rule as to the binding effect of Federal statutes upon the states would seem to be that the United States may bind the states by treaty within the scope of the powers delegated by the states to the Federal government. A Federal treaty is the supreme law of the land and binding upon the states in the same way and to the same extent as a Federal statute * * * * *
>
> Two underlying principles of the same are: First, that the United States may bind the states by treaty within the scope of the powers delegated by the states to the Federal government by the United States Constitution and no further; and Second, that the police power of the state may prevail against the implied and Federal treaty only and so far as it is necessary, in order to prevent the destruction or crippling of the sovereignty of the state government, but that the police power of the state cannot be set up against the provisions of a proposed treaty when the effect of so doing would be not the protection of the state but the prevention or the hindering of the exercise of a governmental power by the United States government."

It therefore results, from what has been said, that the United States has no authority, by treaty, to impose restraints upon the sovereign power of the State of Pennsylvania which would, in effect, nullify and repeal an internal police statute or regulation, like the act in question, which, in the judgment of the State, based upon its experience, is necessary for the protection of its game, and the preservation of the food supply of its people.

To hold otherwise, would be to put ultimately the sovereign state at the mercy of the treaty making power of the Federal Government, by denying to it those police powers of self preservation indispensable to the continued existence of the states themselves, and to violate the necessarily implied limitation on the treaty making power announced by this Court in *Geofroy* vs. *Riggs,* supra.

Even if it were within the treaty making power of the Federal government to guarantee to subjects of the Kingdom of Italy personal rights and rights of property and rights to carry on trade superior to the right of a sovereign state to exercise its inalienable police power, and superior to the right of a citizen of the state, under the fourteenth amendment, the treaty between the United States and Italy invoked by the Plaintiff in Error was not intended to have any such effect.

Assuming, for the sake of the argument, the treaty power of the National Government includes the power, by treaty, to render nugatory the inalienable police power of the State to preserve its food supply (a proposition which we deny as above), nevertheless, the intention by it to so seriously restrict and impair the police power as against vital interests of the citizens of a State, is never to be imputed to the stipulations of a

treaty, unless the language of the treaty plainly expresses such intention, or necessarily implies it. A State statute passed in the exercise of the police power ought never to be stricken down as being unconstitutional, unless it is so clearly and palpably in violation of the supreme law of the land, as expressed in the Constitution, as to leave no reasonable doubt about it. These principles are fundamental in constitutional law.

Jacobson vs. *Mass., 197 U. S., 11.*
Chicago, Rock Island & Pac. Ry. Co. vs. *State of Arkansas, 219 U. S., 453.*
Purity Extract Co. vs. *Lynch, 226 U. S., 192.*

In re *Ghio's Estate, 157 Cal., 552,* the Supreme Court of California, construing this very treaty with Italy, said:

> "An intent of the Federal government to materially abridge by treaty the autonomy of the several states and interfere with and direct the state tribunals in state proceedings affecting private property within their jurisdiction will not be deemed to exist, *unless the language used plainly expresses it, or necessarily implies it.*"

In *Campagnie Francaise &c.* vs. *Board of Health, 186 U. S., 380,* this Court applying this principle of interpretation, held a Quarantine Statute of Louisiana valid under the treaties with foreign powers invoked against it. The claim there made was that these treaties guaranteed certain rights, privileges and immunities to citizens and subjects of these foreign countries, and the present Chief Justice, speaking for this Court, said, (page 394):

> "The treaties of other countries than Italy are referred to upon the theory that as by the treaty

concluded with France on April 3, 1803, by which Louisiana was acquired, it was provided that France should be treated upon the footing of the most favored nation in the ports of the ceded territory, therefore the treaties in question made with other countries than France were applicable to the plaintiff in error, a French subject.

Conceding, arguendo, this latter proposition, and therefore assuming that all the treaties relied on are applicable, we think it clearly results from their context that they were not intended to and did not deprive the government of the United States of those powers necessarily inhering in it and essential to the health and safety of its people. We say the United States, because if the treaties relied on have the effect claimed for them that effect would be equally as operative and conclusive against a quarantine established by the government of the United States as it would be against a state quarantine operating upon and affecting foreign commerce by virtue of the inaction of Congress. * * * * *

But it is plain from the face of the treaty that the provision as to the certificate was not intended to abrogate the quarantine power, since the concluding section of the article in question expressly subjects the vessel holding the certificate to quarantine detention if, on its arrival, a general quarantine had been established against all ships coming from the port whence the vessel holding the certificate had sailed. In other words, the treaty having provided the certificate and given it effect under ordinary conditions, proceeds to subject the vessel holding the certificate to quarantine, if, on its arrival, such restriction had been established in consequence of infection deemed to exist at the port of departure. Nothing in the text of the

treaty, we think, gives even color to the suggestion that it was intended to deal with the exercise by the government of the United States of its power to legislate for the safety and health of its people or to render the exertion of such power nugatory by exempting the vessels of the Kingdom of Greece, when coming to the United States, from the operation of such laws. In other words, the treaty was made subject to the enactment of such health laws as the local conditions might evoke not paramount to them."

In *Trageser* vs. *Gray, 73 Md., 250*, supra, it appeared that the statute of Maryland prohibited the selling of liquor without a license and prohibited the granting to aliens of the requisite licenses. It was contended by an alien, that he could not be denied such a license, and thereby a right to sell under the equal protection of the laws clause of the Fourteenth Amendment, and further, that if he were not guaranteed the right to the license under the Fourteenth Amendment, he was secured such right by the treaty between the United States and Prussia, of which country he was a subject. The court held, with respect to this alleged treaty right, that it could not have been intended to be greater than the right of the citizen of the state under the Fourteenth Amendment, and that the prohibition of the act was a valid one under that amendment. The court said:

> "If we assume, for the sake of argument, that Trageser has under treaties every right which a citizen could have, the answer is that no citizen of the United States can complain, because a police regulation denies him the privilege of selling liquor."

It is respectfully submitted that the proper interpretation of the provisions of the treaty with Italy, in-

voked by the Plaintiff in Error, is that it secures to the Italian subject the same fundamental personal and property rights and rights to trade as are secured to the citizens of the State of Pennsylvania, under the Fourteenth Amendment, but that such rights rise no higher than the rights of the citizen under such amendment. The rights of the citizen under such amendment and of the alien, likewise, thereunder, are subject to the exercise of the police power and, as we have seen, the statute in question is a reasonable and valid exercise of such power, which denies to the alien neither due process of law nor the equal protection of the laws under that amendment. No greater rights under the treaty with Italy can reasonably be inferred from the language used. By its provisions it was intended merely that the rights of the alien should be the same as the citizen, under the Fourteenth Amendment, with respect to the subject matters of personal security, property and the right to trade, specifically mentioned in the treaty.

Indeed, that this is the proper construction to be put upon the treaty is further made plain by the express provision contained therein, which qualifies the rights secured thereby by requiring that aliens shall "submit" "themselves to the laws there established," i. e., in the states of the United States. (Treaty of 1871 of Italy, Art. 2) 17 Statutes at Large (Treaties p. 845.).

In Article III of the same treaty, the language, to wit: "submitting themselves to the conditions imposed upon the natives" is to the same effect. The language in both articles, we submit, implies that the aliens are to submit themselves to the laws of the states, which are established therein, and which do not violate constitutional limitations imposed upon the legislative power of the state.

Conclusion

For the reasons submitted in this brief, as well as those stated by the Superior Court of Pennsylvania, it is submitted:

That the Act of May 8th, 1909 is not in contravention of the Fourteenth Amendment to the Constitution of the United States.

That its effect is not to deprive any person of his property without due process of law, and has not been so enforced as to thus deprive the Plaintiff in Error of his property.

That it does not deny the equal protection of the laws to aliens, that the Plaintiff in Error is not denied the equal protection of the laws, and that it is not in violation of the treaty between the United States and the Kingdom of Italy.

Therefore, the judgment of the Supreme Court of Pennsylvania should be affirmed.

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Wm. M. Hargest,
Second Deputy Attorney General.

John C. Bell,
Attorney General.

For Commonwealth of Pennsylvania.
Defendant in Error.

OPINION

PATSONE *v.* COMMONWEALTH OF PENNSYLVANIA.

ERROR TO THE SUPREME COURT OF THE COMMONWEALTH OF PENNSYLVANIA.

No. 38. Argued November 4, 1913.—Decided January 19, 1914.

The act of May 8, 1909, of Pennsylvania, making it unlawful for unnaturalized foreign born residents to kill wild game except in defence of person or property and to that end making the possession of shot guns and rifles unlawful, is not unconstitutional under the due process and equal protection provisions of the Fourteenth Amendment.

A State may protect its wild game and preserve it for its own citizens. *Geer* v. *Connecticut*, 161 U. S. 519.

A State may classify with reference to the evil to be prevented.

The determination of the class from which an evil is mainly to be feared and specialized in the legislation is a practical one dependent upon experience; and this court is slow to declare that the state legislature is wrong in its facts. *Adams v. Milwaukee*, 228 U. S. 572.

A State may direct its police regulations against what it deems the evil as it actually exists without covering the whole field of possible abuse. *Central Lumber Co.* v. *South Dakota*, 227 U. S. 157.

The provisions in Article II of the treaty with Italy, giving citizens of Italy the right to carry on trade on the same terms as natives of this country, and provisions in the treaty with Switzerland, applicable to citizens of Italy under the favored nation clause in Article XXIV of the treaty with Italy, relate to trade, and are not applicable to personal use of firearms; and a state statute protecting wild game and prohibiting aliens from owning shot guns and rifles is not incompatible with or violative of such treaty provisions.

Quære, and not to be decided on this record, whether the statute in this case can be construed as precluding an alien from possessing a stock of guns for purposes of trade and whether in that event it would violate rights under the treaty with Italy of 1871.

Equality of rights assured to citizens of Italy under the treaty of 1871 is that of protection and security for persons and property and nothing in that treaty purports or attempts to prevent a State from exercising its power for preservation of wild game for its own citizens.

231 Pa. St. 46, affirmed.

THE facts, which involve the constitutionality of the wild game statute of Pennsylvania making it unlawful for any unnaturalized foreign born resident to kill wild birds or animals and the validity of such statute as applied to an Italian citizen in view of the treaty with Italy, are stated in the opinion.

Mr. Marcel Viti for plaintiff in error:

The statute violates the Fourteenth Amendment. It deprives persons of liberty and property without due process of law. *Barbier* v. *Connolly*, 113 U. S. 27; *Mugler* v. *Kansas*, 123 U. S. 623, 661.

While the legislature may have authority to declare unlawful property which is innocent in itself, yet such power must not be exercised in such a way as to infringe fundamental rights to a greater extent than is absolutely necessary for the accomplishment of the legal purpose in view. Neither *Lawton* v. *Steele*, 152 U. S. 133, nor *Geer* v. *Connecticut*, control this case.

The cases of *People* v. *West*, 106 N. Y. 293, 297; *Osborn* v. *Charlevoix*, 114 Michigan, 655; *Luck* v. *Sears*, 29 Oregon, 421; *State* v. *Lewis*, 134 Indiana, 250; *McConnell* v. *McKillip*, 71 Nebraska, 712, can all be distinguished.

A State may forbid absolutely the possession of game within its borders because the individual only acquires therein a qualified right of property; it may also forbid the possession of articles which are not adapted to any but an unlawful use and may confiscate articles actually put to an illegal use or found under circumstances, from which it must necessarily be inferred that such articles had been or were about to be used for an illegal purpose.

Under the terms of the present act the mere possession of property, innocent in itself, and having lawful uses, is made an offence apart from its being used unlawfully and its forfeiture is fixed as part of the penalty.

The legislature cannot provide that implements which are susceptible of beneficial use and which have not been perverted to an unlawful use, be summarily abated or declared forfeited after a hearing, as part of a penalty for the offence of having them in possession.

Shot guns and rifles are articles of property not harmful in themselves, necessary for legitimate uses, and there is no manifest necessity to forbid their possession in order to prevent aliens from hunting game.

The State has not the right to confiscate such property under such circumstances and without a hearing at which he can offer a defence.

The possession of property harmless in itself and which is necessary for lawful purposes cannot be prohibited and the property itself confiscated merely because it is also capable of being put to an illegal use.

The equal protection provisions of the Fourteenth Amendment are violated by the act. It forbids the possession of shot guns and rifles by resident aliens alone, thus depriving them of efficient and essential instruments for protection of person and property. It provides for the confiscation of valuable, innocent property when owned by aliens, notwithstanding that it has never been put to any illegal use. It singles out a class for discriminating and hostile legislation. *Duncan* v. *Missouri*, 152 U. S. 377, 382; *Missouri* v. *Lewis*, 101 U. S. 22, 31.

There is a further discrimination against resident aliens as distinguished from non-resident aliens, as the latter are apparently allowed to possess shot guns and rifles, and use them within the State for the purpose of hunting game for periods of ten days, subject only to the general game laws of the State. *Plessy* v. *Ferguson*, 163 U. S. 530, 537; *State* v. *Montgomery*, 94 Maine, 192; *Templar* v. *Barbers' Board*, 131 Michigan, 254.

These inequalities cannot be justified on the ground of proper classification; see *Railway* v. *Ellis*, 165 U. S. 150, 155; *Yick Wo.* v. *Hopkins*, 118 U. S. 356, 369.

The statute contravenes the existing treaty between the United States and Italy of 1871; see Arts. II, III, 17 Stat. 845; and under the favored nation clause, Art. XXIV of that treaty, this statute also violates the provisions of the treaty with Switzerland of 1855, 9 Stat. 597, putting citizens on a footing of reciprocal equality. By this statute an Italian farmer in Pennsylvania cannot protect his property from birds and dogs even though wild and subject to be killed by citizens. See *In re Marshall*, 102 Fed. Rep. 325.

The wording of the treaty is plain and shows that the

contracting parties intended that their subjects should at least enjoy in the territory of each other the same liberty of carrying on trade and protection and security of their persons and property as natives under like conditions. *Maiorano* v. *Balt. & Ohio R. R. Co.*, 213 U. S. 268; *Crowley* v. *Christianson*, 137 U. S. 91.

The terms of the act are not limited to any class or nationality whatsoever. An alien merchant or manufacturer who may have spent most of his life in Pennsylvania, adding to its wealth as well as his own, not only may not shoot game, upon his own land, which has been held a right of property in *State* v. *Mallory*, 73 Arkansas, 236, but he is not allowed the possession of a shot gun or rifle upon such property for the protection thereof or for use in hunting game in other States where he might lawfully shoot under regulations applying to non-resident aliens.

No State may prohibit the possession of any lawful article of trade and commerce to Italian subjects and at the same time allow its possession by natives without violating the quoted treaty provisions.

In addition to violating the Italian treaty the act violates the treaty with Switzerland by imposing upon Italian subjects more burdensome conditions and other conditions in respect to the possession of property and the exercise of commerce than are imposed upon natives.

Treaties are the supreme law of the land and all state authority is subordinate thereto, especially when the treaty, as in this case, is self-executing, *Hauenstein* v. *Lynham*, 100 U. S. 484, and relates to a proper subject of treaty negotiation. *Jacobson* v. *Massachusetts*, 197 U. S. 11, 24. See also *Matter of Heff*, 197 U. S. 405, 488.

Mr. John C. Bell, Attorney General of the State of Pennsylvania, and *Mr. William M. Hargest*, with whom *Mr. W. H. Lemon* was on the brief, for defendant in error.

MR. JUSTICE HOLMES delivered the opinion of the court.

The plaintiff in error was an unnaturalized foreign born resident of Pennsylvania and was complained of for owning or having in his possession a shot gun, contrary to an act of May 8, 1909. Laws, 1909, No. 261, p. 466. This statute makes it unlawful for any unnaturalized foreign born resident to kill any wild bird or animal except in defence of person or property, and 'to that end' makes it unlawful for such foreign born person to own or be possessed of a shot gun or rifle; with a penalty of twenty-five dollars and a forfeiture of the gun or guns. The plaintiff in error was found guilty and was sentenced to pay the above mentioned fine. The judgment was affirmed on successive appeals. 231 Pa. St. 46. He brings the case to this court on the ground that the statute is contrary to the Fourteenth Amendment and also is in contravention of the treaty between the United States and Italy, to which latter country the plaintiff in error belongs.

Under the Fourteenth Amendment the objection is two-fold; unjustifiably depriving the alien of property and discrimination against such aliens as a class. But the former really depends upon the latter, since it hardly can be disputed that if the lawful object, the protection of wild life (*Geer* v. *Connecticut*, 161 U. S. 519), warrants the discrimination, the means adopted for making it effective also might be adopted. The possession of rifles and shot guns is not necessary for other purposes not within the statute. It is so peculiarly appropriated to the forbidden use that if such a use may be denied to this class, the possession of the instruments desired chiefly for that end also may be. The prohibition does not extend to weapons such as pistols that may be supposed to be needed occasionally for self-defence. So far, the case is within the principle of *Lawton* v. *Steele*, 152 U. S. 133.

See further *Silz* v. *Hesterberg*, 211 U. S. 31. *Purity Extract Co.* v. *Lynch*, 226 U. S. 192.

The discrimination undoubtedly presents a more difficult question. But we start with the general consideration that a State may classify with reference to the evil to be prevented, and that if the class discriminated against is or reasonably might be considered to define those from whom the evil mainly is to be feared, it properly may be picked out. A lack of abstract symmetry does not matter. The question is a practical one dependent upon experience. The demand for symmetry ignores the specific difference that experience is supposed to have shown to mark the class. It is not enough to invalidate the law that others may do the same thing and go unpunished, if, as a matter of fact, it is found that the danger is characteristic of the class named. *Lindsley* v. *Natural Carbonic Gas Co.*, 220 U. S. 61, 80, 81. The State 'may direct its law against what it deems the evil as it actually exists without covering the whole field of possible abuses.' *Central Lumber Co.* v. *South Dakota*, 226 U. S. 157, 160. *Rosenthal* v. *New York*, 226 U. S. 260, 270. *L'Hote* v. *New Orleans*, 177 U. S. 587. See further *Louisville & Nashville R. R. Co.* v. *Melton*, 218 U. S. 36. The question therefore narrows itself to whether this court can say that the Legislature of Pennsylvania was not warranted in assuming as its premise for the law that resident unnaturalized aliens were the peculiar source of the evil that it desired to prevent. *Barrett* v. *Indiana*, 229 U. S. 26, 29.

Obviously the question so stated is one of local experience on which this court ought to be very slow to declare that the state legislature was wrong in its facts. *Adams* v. *Milwaukee*, 228 U. S. 572, 583. If we might trust popular speech in some States it was right—but it is enough that this court has no such knowledge of local conditions as to be able to say that it was manifestly

wrong. See *Trageser* v. *Gray*, 73 Maryland, 250. *Commonwealth* v. *Hana*, 195 Massachusetts, 262.

The defence under the treaty with Italy of February 26, 1871, 17 Stat. 845, appears to us to present less difficulty. The provisions relied upon are those in Article 2, giving to citizens of Italy the right to carry on trade and to do anything incident to it upon the same terms as the natives of this country; in Article 3, assuring them security for persons and property and that they "shall enjoy in this respect the same rights and privileges as are or shall be granted to the natives, on their submitting themselves to the conditions imposed upon the natives" and in Article 24 promising to the Kingdom of Italy the same favors in respect to commerce and navigation that may be granted to other nations. We will say a word about each.

The last article is supposed to make applicable a convention with Switzerland (proclaimed November 9, 1855, 11 Stat. 597) providing against more burdensome conditions being imposed upon the residence of Swiss than upon that of citizens. But Article 24 refers only to commerce and navigation and the case must stand wholly upon Articles 2 and 3. As to Article 2 it will be time enough to consider whether the statute can be construed or upheld as precluding Italians from possessing a stock of guns for purposes of trade when such a case is presented. The act was passed for an object with which possession in the way of trade has nothing to do and well might be interpreted as not extending to it. There remains then only Article 3. With regard to that it was pointed out below that the equality of rights that it assures is equality only in respect of protection and security for persons and property. The prohibition of a particular kind of destruction and of acquiring property in instruments intended for that purpose establishes no inequality in either respect. It is to be remembered that the subject of this whole discussion is wild game, which the State may preserve for

its own citizens if it pleases. *Geer* v. *Connecticut*, 161 U. S. 519, 529. We see nothing in the treaty that purports or attempts to cut off the exercise of their powers over the matter by the States to the full extent. *Compagnie Francaise de Navigation a Vapeur* v. *State Board of Health*, 186 U. S. 380, 394, 395.

Judgment affirmed.

THE CHIEF JUSTICE dissents.